Case No: C/2001/2808

Neutral Citation Number: [2002] EWCA Civ 606
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
The Hon. Mr. Justice Turner

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 30th April 2002

B e f o r e :

LORD PHILLIPS MR
LORD JUSTICE POTTER
and
LADY JUSTICE ARDEN

- -

THE QUEEN ON THE APPLICATION OF LOUIS FARRAKHAN	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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- -

Monica Carss-Frisk, QC and Steven Kovats (instructed by **The Treasury Solicitor** for the Appellant)
Nicholas Blake, QC, Matthew Ryder and Raza Husain (instructed by **Christian Fisher** for the Respondent)

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Judgment
As Approved by the Court

Lord Phillips MR:

This is the judgment of the Court

Introduction

1. Louis Farrakhan is a United States citizen who is based in Chicago. He is an African-American. He is the spiritual leader of the Nation of Islam, a religious, social and political movement whose aims include 'the regeneration of black self-esteem, dignity and self discipline'. A branch of the Nation of Islam has been established in the United Kingdom. Mr Farrakhan has long been anxious to come to address his followers in this country and they have been keen to receive a visit from him. Thus far, he has never been permitted to enter the country. This appeal concerns the most recent decision of the Secretary of State for the Home Department refusing him admission.

2. That decision was contained in a letter dated 20 November 2000. The reasons given for excluding Mr Farrakhan included the following:

> "[He] has given close attention to the current tensions in the Middle East and to the potential impact on community relations in the United Kingdom. He has concluded that a visit to the United Kingdom by [Mr Farrakhan], or the lifting of his exclusion generally, would at the present time pose an unwelcome and significant threat to community relations and in particular to relations between the Muslim and Jewish communities here and a potential threat to public order for that reason. Further, the Home Secretary remains concerned that the profile of [Mr Farrakhan's] visit would create a risk of public disorder at those meetings."

3. Mr Farrakhan applied to Turner J. for an order quashing the decision of the Secretary of State. His application succeeded. In a judgment dated 1 October 2001 Turner J. held that the Secretary of State was required to demonstrate objective justification for excluding Mr Farrakhan from this country and that this he had failed to do.

4. The Secretary of State applied to Sedley L.J. for permission to appeal to this Court. Sedley L.J. granted his application, but in his reasons indicated that he did not consider that the appeal had a realistic prospect of success. The reason that he gave permission to appeal was because the issues raised by this case would be relevant on the next occasion that Mr Farrakhan applied to enter this country. As to these, Sedley L.J. commented:

> "There is no issue about the primacy of the Home Secretary's judgment; nor about the need for it to be within the law. The main issues in my view are:

- To what extent Art.16 limits the applicability of Art. 10 to the Home Secretary's exercise of his power to exclude a foreign national from the UK on public good grounds.

- To what extent the licence for local intolerance given by the Otto Preminger decision ought to affect judicial review of executive decisions in this country.

Whatever the answers, the Home Secretary will still have to face up to the exiguousness of the grounds for his decision."

The nature of the challenge

5. Mr Blake, QC, on behalf of Mr Farrakhan, described the challenge made to the decision of the Secretary of State as a 'reasons challenge'. The Secretary of State had explained the policy that he had applied when considering whether Mr Farrakhan should be admitted to this country. He had failed, however, to give the reasons why the application of that policy had led to the exclusion of Mr Farrakhan. The consequence of the quashing of his decision was not that he was obliged to admit Mr Farrakhan, but that, if he decided to continue to exclude him, he would have to provide adequate reasons for so doing.

6. It is correct that the judgment of Turner J. is redolent with statements that the Secretary of State had given inadequate reasons for his decision. But the basis upon which his decision was quashed is encapsulated in the following sentence from paragraph 48 of the judgment:

> "The inference which a court is bound to draw in the absence of a sufficiency of justification (reasons) is that there are none which will support the conclusion reached, or decision made, as being properly within the 'discretionary area of judgment'."

7. We do not believe that, under established principles of judicial review, the absence of reasons gives rise to the inference that none exists. Turner J. did not, however, rest on the inference to which he referred. He held, in paragraphs 41 and 42, that it was appropriate to carry out a rigorous review of the 'reasons provided and of the underlying circumstances' in order to decide whether the Secretary of State had reached a conclusion which was not open to a reasonable decision maker. In considering whether there was a basis for the supposition that a likelihood or risk that disorder would occur if Mr Farrakhan were to be admitted to this country, it was necessary to look at the history and at the nature of Mr Farrakhan's teachings.

8. Turner J. performed that exercise and concluded that it had not been shown that there was more than a 'nominal risk' that community relations would be harmed if Mr Farrakhan visited this country. It was on that basis that he ordered that the Secretary of State's decision should be quashed.

9. Turner J's decision was pronounced on 31 July 2001, but his reasoned judgment was handed down on 1 October. The events of September 11 had intervened. We suspect that it was with those events particularly in mind that Turner J., on October 1, emphasised that his judgment had regard to the state of affairs pertaining on 31 July and that nothing in his judgment could prejudge what decision might have been taken if other domestic political or international circumstances had prevailed.

10. Before us Mr Blake emphasised the point, which was plainly correct, that if we were to uphold Turner J's judgment, the Secretary of State would have to consider afresh, in the light of the circumstances prevailing at the time, any renewed application by Mr Farrakhan, to enter this country. The only practical significance of this judgment lies in any guidance that it may afford to the Secretary of State should he have to undertake that task.

The legislative framework

11. The position of persons seeking to enter this country from abroad is governed by a complex patchwork of statutory rules and regulations. Section 1 of the Immigration Act 1971 empowers the Secretary of State to lay down rules for regulating the entry into the United Kingdom of persons not having a right of abode here, including visitors. Section 3 of that Act provides that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, the Act.

12. Lengthy Immigration Rules (HC395) have been made pursuant to ss. 1, 3(2) of the 1971 Act. Rule 41 lays down requirements for leave to enter as a visitor with which Mr Farrakhan would have complied. Rule 320(6) provides, however, that grounds for refusing leave to enter include:

> "Where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good."

13. Section 59 of the Immigration and Asylum Act 1999 makes provision for an appeal to an adjudicator against the refusal of leave to enter the United Kingdom. Section 60(9) of that Act provides, however, that:

> "Section 59 does not entitle a person to appeal against a refusal of leave to enter, or against a refusal of an entry clearance, if-
>
> (a) the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority) for the appellant not to be given entry to the United Kingdom on the ground that his exclusion is conducive to the public good;
>
> or

(b) the leave to enter, or entry clearance, was refused in compliance with any such directions."

The history of the exclusion of Mr Farrakhan

14. Mr Farrakhan is a charismatic and a controversial figure. On various occasions, none of which was later than 1998, his public pronouncements in the United States embraced accusations, in extreme language, that those who had been guilty of exploiting the black people included wealthy Jews. More recently he has emphasised the need for black people to establish self-esteem, dignity and self-discipline.

15. On 16 January 1986, the then Home Secretary, Mr Douglas Hurd, gave his personal direction that Mr Farrakhan should be excluded from the United Kingdom on the ground that his presence would not be conducive to the public good. He expressed the belief that Mr Farrakhan's public statements in the United States gave reasonable cause to believe that, if he came to the United Kingdom, he would be likely to cause racial disharmony and possibly commit the offence of inciting racial hatred.

16. No attempt to challenge Mr Farrakhan's exclusion appears to have been made until 1997. In September of that year the late Mr Bernie Grant MP invited Mr Jack Straw, who was then Home Secretary, to reconsider Mr Farrakhan's continued exclusion. Mr Straw replied on the 30 October 1997 as follows:

> "As in all cases where individuals have been excluded from the United Kingdom the need for Mr Farrakhan's continued exclusion is the subject of regular review. The most recent review was carried out in July this year at an official level. Other Government Departments were consulted and all representations made, whether they were in support of Mr Farrakhan's admission or against it, were taken into consideration at the time. My Department were advised at the time that it was possible that some of Mr Farrakhan's public statements could, if repeated in the United Kingdom, contravene the Public Order Act 1996. It was concluded that the threat Mr Farrakhan posed to the maintenance of racial harmony in the United Kingdom remained. The exclusion was therefore maintained.
>
> In the light of your letter I have decided personally to conduct a full review of the decision. The exclusion will stand until I have reached a final conclusion, and you will understand that my review of this case does not in any way pre-empt the final conclusion I may reach.
>
> The balance between the need to preserve the freedom of speech and the undesirability of giving a platform here to those espousing views which would be deeply offensive to the public or large sections of the community is, of course, a very delicate one."

17. On 9 June 1998, while Mr Straw's review was in progress, the British Vice-Consul in Chicago wrote to Mr Farrakhan, inviting him to sign an undertaking. The letter stated that this document, once signed, would be submitted to the Secretary of State for a final decision on Mr Farrakhan's exclusion. Mr Farrakhan signed the undertaking, which was in the following terms:

> "I understand that Britain is a diverse multi-cultural society which places a high value on the maintenance of good relations between the different communities. I confirm that I would not engage in conduct during any visit which would jeopardise those good relations.
>
> In particular I will ensure that I do not say anything during any visit which would vilify any group within the United Kingdom or which would otherwise incite discord in the community. I understand that the long standing right to freedom of speech which is enjoyed in Britain must be exercised with due care to the rights of others to live in a society where abusive and threatening behaviour is not tolerated.
>
> I am aware that Britain has legislation which makes it a criminal offence to incite racial hatred. I understand that under the Public Order Act 1986 it is a criminal offence in Great Britain to use threatening, abusive or insulting words or behaviour with the intention or likelihood of thereby stirring up racial hatred. I understand that the same test also applies to the display of written material; the publication or distribution of written material; the distribution, showing or playing of a recording; and the possession of racially inflammatory material. I understand that in this context "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. I understand that similar offences exist in Northern Ireland. During any visit I will abide by this legislation.
>
> I understand that should I breach this undertaking on any visit the question of my exclusion from the United Kingdom at the personal direction of the Secretary of State for the Home Department will be reconsidered."

The Secretary of State has proffered no explanation of why Mr Farrakhan was invited to sign this document.

18. On 29 June there was a highly publicised disturbance outside the building where the Stephen Lawrence Inquiry was being held. Three members of the Nation of Islam were arrested and charged, two with obstructing the police in the execution of their duty and one with affray contrary to the Public Order Act 1986.

19. On 6 July 1998 an official in the Asylum and Appeals Policy Directorate wrote to Mr Farrakhan to inform him that the Secretary of State was minded to maintain his exclusion from the United Kingdom on the grounds that his presence here 'would not be conducive to the public good for reasons of race relations and the maintenance of public order'. Early in the letter the writer explained:

> "The Home Secretary is able personally to exclude from the United Kingdom any individual whose presence here would not be conducive to the public good. An individual who holds views which are deeply offensive to large sections of the population would not normally be excluded unless the Home Secretary was also satisfied that that individual posed a threat to the public order here or was likely to commit criminal offences here, in particular under the racial hatred provisions of the Public Order Act 1986."

20. The letter referred to a number of matters considered by the Secretary of State, which weighed in favour of admitting Mr Farrakhan. It also referred to a number of anti-Semitic remarks said to have been made by Mr Farrakhan. It referred to conflicting reactions of two different groups of consultees:

> "He has also formally consulted several groups representing the black and Muslim population in the United Kingdom and has considered their views. All these groups expressed the basic sentiment that refusing to allow you into the United Kingdom without any firm evidence that your presence would lead to racial disturbance ran counter to the liberal and tolerant traditions of this country.
>
> ….
>
> The Home Secretary has received numerous representations against the lifting of your exclusion from Members of Parliament here and from Jewish representative bodies. They have suggested that your views are bigoted and racially divisive; that they exceed the right to freedom of speech and that the spreading of such views incites anti-Semitism. In the circumstances the Home Secretary considers there is a serious concern that you would, whilst in the United Kingdom, use language which would constitute an offence under the public Order Act 1986 of stirring up racial hatred."

21. The letter then referred to the disturbance at the Stephen Lawrence Inquiry and to a sequel to this:

> "The Home Secretary considers that the actions taken at this Inquiry by members of the Nation of Islam undermine your claims that if permitted to enter the United Kingdom you would not come to stir racial or religious tension. Furthermore, the incident gives rise to serious concern that any visit by you

would pose a serious threat to public order as a result of the actions taken by Nation of Islam members here and the raising of racial tension."

22. The letter ended with the following provisional decision:

> "The Home Secretary accordingly remains of the view that your presence here would be deeply offensive to large sections of the population. He has considered your application with great care, taking account of your representations and your willingness to sign an undertaking. But the issue before him is whether he can be satisfied that the undertaking is sufficient to ensure that the damage to race relations and the risk of serious disorder caused by your presence here is acceptably low. In the light of all the information he has received during the review he cannot be so satisfied and is therefore minded to maintain your exclusion from the United Kingdom."

It invited further representations before a final decision was taken.

23. On 23 July 1999 the Immigration and Nationality Directorate wrote to Mr Farrakhan's solicitors in the following terms:

> "This is to inform you that, after very careful consideration of all the circumstances of his case, the Home Secretary has now decided that Mr Farrakhan should continue to be excluded form the United Kingdom. In reaching his decision the Home Secretary took into account, inter alia, the racist and offensive views Mr Farrakhan had expressed whilst in the United States and the threat to public order in the United Kingdom posed by some of his supporters, as evidenced by the behaviour of some members of the Nation of Islam at the Stephen Lawrence Inquiry on 29 June last year.
>
> You asked for details of the review process culminating in the Home Secretary's decision. On 24 November 1997 the Immigration and Nationality Directorate informed Mr Farrakhan that the Home Secretary had decided personally to review his exclusion. Mr Farrakhan was invited to submit representations and the views of a range of groups representing ethnic minority communities were sought. I can confirm that the Home Secretary received and considered views from Mr Farrakhan, his representative, Minister Ava Muhammad and the groups mentioned above. He also received a large number of unsolicited letters from other bodies, members of the public and from Members of Parliament, both for and against maintaining the exclusion. I am afraid that we are not prepared to disclose to you which groups he consulted or the content of the representations they made but I can assure you that the

> Home Secretary took great care to ensure that a broad range of views was canvassed.
>
> The review process was nearing its completion when the Home Secretary learnt of the events at the Stephen Lawrence Inquiry. On 6 July last year the Immigration and Nationality Directorate wrote to Mr Farrakhan to inform him that the Home Secretary was minded to maintain the decision to exclude him and inviting a further response from Mr Farrakhan. After very careful consideration of the response sent on Mr Farrakhan's behalf by Ms Muhammad and other representations he received over this period, the Home Secretary decided, for the reasons given above, that Mr Farrakhan should continue to be excluded. I am directed to inform you that there is no right of appeal against this decision."

24. This led Mr Farrakhan's solicitors to write, on 25 August, seeking particulars of Mr Farrakhan's "racist and offensive views" and details of the "threat to public order in the United Kingdom" perceived by the Home Secretary. The Directorate replied on 14 October 1999, annexing a schedule of "anti-Semitic and racially divisive views" which Mr Farrakhan was alleged to have expressed. The letter explained:

> "……the Secretary of State is of the view that a visit to the United Kingdom by Minister Farrakhan poses an unacceptable risk that, as a result of the words and behaviour of the Minster, racial tension will be increased to a point where supporters of the National of Islam would commit public order offences or others would be provoked to commit such offences, as evidenced by the events of 29 July 1998 at the Stephen Lawrence Inquiry, however contrary to the wishes of the Minister this might be."

25. Mr Farrakhan's solicitors replied at great length to this letter on 8 March 2000. They gave details of the seven day visit that Mr Farrakhan wished to make to the United Kingdom. This would include meetings with community leaders and local community groups to promote 'positive, crime-free, drug-free and socially responsible behaviour within the community' and a public speech on 'Atonement, Reconciliation and Responsibility'. The letter addressed the suggestion that the behaviour of members of the Nation of Islam outside the Stephen Lawrence Inquiry was cause for concern, tracing the subsequent prosecution of one member for affray and the vigorous criticism of this course by Otton LJ in the Court of Appeal. The letter contended that apparently offensive comments said to have been made by Mr Farrakhan had been taken out of context and that two of these had been wrongly attributed to him.

26. We have set out at the beginning of this judgment the most significant passage from the Secretary of State's decision letter of 20 November 2000. Because of the attack that has been made on the adequacy of the reasons given by him, it is right that we should set out the earlier part of that letter:

"The Home Secretary has carried out a personal review of the exclusion, taking into careful account all the circumstances and the points raised in your letters.

He has attached particular weight to the following points which you raise:

a. Copies of many of Mr Farrakhan's speeches are in free circulation within the United Kingdom and have not been the subject of legal proceedings.

b. A dialogue between the Nation of Islam and certain Jewish groups has been opened in the USA.

c. The Nation of Islam has a reputation for advocating social responsibility.

d. Apart from the incident at the Stephen Lawrence inquiry on 29 June 1998, there is no record of violent disorder associated with the group in the UK.

The Secretary of State has also taken into account, as matters favourable to Mr Farrakhan, the following:

a. Mr Farrakhan is not excluded from any other country.

b. The Secretary of State finds nothing objectionable in Mr Farrakhan's conduct during his visit to Australia, Canada and Israel.

c. Mr Farrakhan has signed assurances as to his behaviour should he be allowed to visit the United Kingdom.

d. Mr Farrakhan's current message of reconciliation.

The Secretary of State has also taken into account that freedom of expression is a fundamental right, recognised both by the common law and by the European Convention on Human rights. It encompasses not only ideas that are favourably received but also those that offend shock or disturb. Any restrictions of this freedom must be prescribed by law and be necessary in a democratic society. And any restrictions must pursue a legitimate aim and be proportionate. It is, however, permissible to impose greater restrictions on the political activity of aliens than of a State's own citizens.

The Home Secretary nevertheless remains satisfied that Mr Farrakhan has expressed anti-Semitic and racially divisive views, notwithstanding the explanations offered in relation to the particular examples in the correspondence. For example, the tenor of the remarks by Mr Farrakhan listed in paragraphs 5

to 9 of the appendix to your letter of 8 March 2000 indicate that Mr Farrakhan apparently believes in an extensive Jewish conspiracy. Further, the Home Secretary is aware that sections of the community, in particular the Jewish community, clearly associate Mr Farrakhan with anti-Semitic views. The Home Secretary does not consider this perception to be without foundation."

The decision of Turner J.

27. Turner J noted that the decision letter referred inferentially to the following Articles of the European Convention on Human Rights:

> "*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.
>
> *Article 16*
>
> *Restrictions on political activity of aliens*
>
> Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

He commented at paragraph 16 that the court had to review the decision in accordance with the approach to review of restrictions on Convention rights and that the question was whether the interference with the right both to impart and to receive information could be justified in a democratic society.

28. Turner J. set out at length the contentions advanced on behalf of Mr Farrakhan. These focussed on Article 10 of the Convention. While it was conceded that this did not, of itself, confer a right of entry on an alien, it was contended that if, as in the case of Mr Farrakhan, the only identifiable reason for maintaining the refusal of entry was restriction of freedom of expression, the Home Secretary had to justify that restriction under Article 10.2. Furthermore the freedom of expression that was engaged was not merely that of Mr Farrakhan, but also that of his followers in the United Kingdom who wished to hear what he had to say.

29. For the Home Secretary, Turner J. recorded the concession that freedom of speech could only be restricted if it was necessary in a democratic society, as identified in Article 10.2. It was contended that in the case of an alien seeking to enter the United Kingdom, the Home Secretary retained a broad area of discretion and that Mr Farrakhan had been refused entry into the United Kingdom in the interests of the community in the exercise of proper immigration considerations and his right to freedom of speech could not override these.

30. Turner J. went on to conduct a 'rigorous review' of whether there were reasonable grounds to suppose that admitting Mr Farrakhan to this country would involve a significant risk of civil disorder. The extent of his analysis of the background evidence is apparent from the following list of factors which he considered to be indicative of the context and probable content of the pronouncements that Mr Farrakhan was likely to make:

> "1. NOI developed in the United States among the Afro-American communities, which have historically faced discrimination, from among others, Jewish-Americans, who in their turn have also faced discrimination.
>
> 2. The teaching of NOI concerns the need for self-reliance, self-discipline and the observance of religious, as well as national laws. The need to develop responsibility among that part of society which has, or has felt itself to have been culturally or economically disadvantaged.
>
> 3. Disapproval of violence, drugs and crime.
>
> 4. In 1998, a march was organised in Trafalgar Square by NOI in which more than 10,000 people took part. It passed off without incident.
>
> 5. The only recorded incident which might have indicated a propensity to violence or disorder was that at the Stephen Lawrence Inquiry, as to which, see above.
>
> 6. The terms of the first three paragraphs of the undertaking of June 1998, above, the integrity of which have never been the subject of challenge or doubt.
>
> 7. The outline programme contained in section 2 of the claimant's solicitors' letter of application dated 8 March 2000.

8. The fact that the claimant has been set on a path of reconciliation with Jewish leaders in the United States.

9. There is no evidence to support the position upon which the Home Secretary relied in July 1998 (bundle p.42) as still applying in 2001.

10. The fact that the entry was for a limited period and limited purpose.

11. There was no history of violence or public disorder in relation to any public gathering associated with the Claimant in the United States or elsewhere, including most importantly, Israel.

12. The mere recital of grounds which might have supported maintenance of the ban on the claimant could not support the Home Secretary's decision which had to demonstrate that he had in fact engaged with the complete circumstances of the application."

31. Turner J. then considered the jurisprudence on the approach to be adopted by the court when reviewing an executive decision that interfered with a fundamental right. He concluded at paragraph 48 that the effect of this was that the terms of the Home Secretary's decision had to demonstrate that he had properly found and identified 'substantial objective justification' for his decision. His conclusions appear in the following passage from paragraph 53 of his judgment:

> "The claimant is, and only holds himself out to be a Black Muslim. Insofar as his pronouncements have touched upon the relations between Jews and Muslims, they have been so restricted, particularly those in the United States of America. Historically, the claimant's statements relating to Jews were directed in the main to the inequality which existed between Jews and Black Muslims both of whom were and are racial minorities in the United States. The time when those pronouncements were made and which reached a state of great hyperbole and rhetoric has effectively now passed. The contemporary, and undisputed, evidence before the court, and so far as is disclosed in the decision letter also before the Home Secretary, was that in the more recent past the claimant has endeavoured to follow a path of reconciliation between Jews and Black Muslims as well as teaching the latter the virtues of self discipline and respect. Apart from the incident at the Stephen Lawrence Inquiry, which was successfully dealt with by NOI as an internal disciplinary matter, there is no history in this country or abroad of meetings or gatherings of NOI leading to any form of disturbance. Indeed two high profile marches in the United States, to one at least, of which Jews were invited to, and did, take part, passed off without incident. There is a complete absence of evidence before the Court of racial,

> religious or ethnic tension between the Black Muslim and Jewish communities in the United Kingdom existing at the date of the decision letter. Of course it might be the case that this was due to the policy of exclusion of religious zealots of whom the claimant may be one. But it is in my judgment simply not made out, as it must if the Home Secretary is to be successful in this case, that there was more than a nominal risk that community relations would be likely to be endangered if the ban on the claimant's entry to the United Kingdom for the limited purposes and duration which he has sought were to be relaxed."

Is Article 10 of the Convention engaged?

32. Mr Pannick, QC, who appeared for the Secretary of State before Turner J., had conceded that the facts of the case engaged Article 10 of the Convention. We gave advance warning to Counsel that we wished to hear submissions as to why this was so. This led Miss Carss-Frisk, QC, who appeared for the Secretary of State before us, to submit that Article 10 was not in fact engaged. Mr Farrakhan had been refused entry because his presence in this country was not desirable. In those circumstances Article 10 gave him no right to demand entry in order to exercise his freedom of speech within this country.

33. Before the hearing of this appeal we had entertained doubts as to whether Article 10 was engaged where the authorities of a State refused entry to an alien, even if their sole reason for doing so was that they did not wish him to exercise a freedom to express his opinions within their territory. Article 10 requires the authorities of a State to permit those within its boundaries freely to express their views, even if these are deeply offensive to the majority of the community. It did not seem to us to follow that those authorities should be obliged to allow into the State a person bent on giving its citizens such offence.

34. It is a remarkable fact that almost all the Articles of the Convention which permit, for specified purposes, restrictions on the freedoms that they guarantee, do not include in those purposes the exercise of control of immigration. This strongly suggests to us that those who negotiated the Convention only envisaged that its obligations would apply to the treatment of individuals who were within the territory of the Member State concerned. This impression is enhanced by the fact that, under Article 5.1(f) an exception to the right to liberty is 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country'. The Convention is, however, a living instrument and, in accordance with the requirement of section 2 of the Human Rights Act 1998, we must have regard to the Strasbourg jurisprudence when considering whether Article 10 imposes obligations in relation to an alien who is seeking admission to a Member State. In this context we should record that, for the purposes of this case, the Secretary of State was prepared to accept that the fact that an individual was neither a citizen of a Member State nor within the territory of a Member State did not, of itself, preclude the application of the Convention. We have

proceeded on the basis of that concession without examining whether or not it is correctly made.

35. A similar issue to that with which we are concerned arose in relation to Article 8 of the Convention in *Abdulaziz and Others v United Kingdom* (1985) 7 EHRR 471. The applicants were women settled in the United Kingdom who complained that their rights to respect for family life were infringed because their husbands were refused permission to enter in order to join them. The Government argued that Article 8 did not apply to immigration control. Both the Commission and the Court rejected this submission, holding – see paragraph 59 – that immigration controls had to be exercised consistently with Convention obligations and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8.

36. The Court observed in the next paragraph that the applicants were not the husbands but the wives, who were complaining not of being refused leave to enter, but as persons lawfully settled in the country of being deprived of the society of their spouses there. However, in paragraph 67 the Court observed:

> "….in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory."

37. In Article 8 cases the Court has been reluctant to override decisions taken in the interests of immigration control on the ground that they interfere with respect for family life. The jurisprudence of the Court was accurately summarised by the Commission in *Poku v United Kingdom* (1996) 22 EHRR CD 94 at CD 97-8, and in particular in the following passage:

> "Whether removal or exclusion of a family member from a contracting states [sic] is incompatible with the requirements of article 8 will depend on a number of factors; the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (eg history of breaches of immigration law) or considerations of public order (eg serious or persistent offences) weighing in favour of exclusion."

38. It is apparent, however, that an immigration decision can bring Article 8 into play. Furthermore, we have no doubt that if a State were to refuse entry with the motive of preventing the enjoyment of family life because, for instance, of a policy of opposing

the intermarriage of its citizens with aliens, the Court would hold that Article 8 was infringed.

39. We turn to decisions involving Article 10, of which there are very few. Miss Carss-Frisk relied heavily on the decision of the Commission in *Agee v United Kingdom* (1976) 7 D & R 164. The Secretary of State had made a deportation order against the applicant, who was a United States citizen, on grounds which included that he had maintained regular contacts harmful to the security of the United Kingdom with foreign intelligence officers. He complained that this infringed a number of his Convention rights, including Article 10. The Commission held that this complaint was manifestly ill-founded, observing at paragraph 19:

> "Art 10(1) of the Convention provides inter alia that everyone has the right to freedom of expression and that this right includes freedom 'to receive and impart information and ideas without interference by public authority…..'
>
> However, Art 10 does not in itself grant a right of asylum or a right for an alien to stay in a given country. Deportation on security grounds does not therefore as such constitute an interference with the rights guaranteed by Art 10. It follows that an alien's rights under Art 10 are independent of his right to stay in the country and do not protect this latter right. In the present case the applicant has not, whilst in the jurisdiction of the United Kingdom, been subjected to any restrictions on his rights to receive and impart information. Nor has it been shown that the deportation decision in reality constituted a penalty imposed on the applicant for having exercised his rights under Art 10 of the Convention, rather than a proper exercise on security grounds of the discretionary power of deportation reserved to States."

40. We observe that it is implicit in this passage that the Commission might have considered the complaint well-founded if the reason for Mr Agee's deportation had been the manner in which he exercised freedom of speech.

41. Mr Blake submitted that there was a decision of the Court which demonstrated that Article 10 could be engaged in the context of a refusal to permit an alien to enter the territory of a Member State. *Piermont v France* (19950 20 EHRR 301 involved an application by a German MEP. She entered French Polynesia at a time when an election campaign was in progress at the invitation of the leader of the Liberation Front. She took part in a public meeting and subsequently in a demonstration at which she denounced nuclear testing and the French presence in the Pacific. The High Commissioner made an order expelling her for attacking French policy. She was then excluded from entry to New Caledonia by the High Commissioner for reasons that included his belief that her presence there during an election campaign was likely to cause public disorder. She complained that Article 10 of the Convention was infringed on both occasions, contending that neither lawful entry nor lawful residence was necessary for Article 10 to apply.

42. The French Government sought to rely on Article 16. The Court held that the fact that the applicant was a national of a Member State of the European Union and a member of the European Parliament meant that Article 16 could not be raised against her.

43. So far as the expulsion from Polynesia was concerned, both the Commission and the Court upheld the applicant's complaint. They held that a fair balance had not been struck between, on the one hand, the public interest requiring the prevention of disorder and territorial integrity and, on the other, the applicant's freedom of expression.

44. So far as the refusal to admit the applicant into New Caledonia was concerned, the view of the Commission differed from that of the Court. The Commission held that the fact that the applicant was unable to exercise certain rights, particularly the right to freedom of expression, in New Caledonia was a consequence of the refusal to allow her to enter the territory, which was a measure that was compatible with the Convention. Accordingly there was no violation of Article 10.

45. The Court was divided 5 to 4. The minority agreed with the Commission. The majority held, however, that:

> "The exclusion order made by the High Commissioner of the Republic amounted to an interference with the exercise of the right secured by Article 10 as, having been detained at the airport, the applicant had not been able to come into contact with the politicians who had invited her or to express her ideas on the spot."

46. The Court went on to consider whether the interference with the applicant's freedom of expression was justified. In so doing it simply considered whether the exceptions of necessity in the interests of prevention of disorder or territorial integrity provided for by Article 10.2 justified the interference. It held that they did not as the interference was disproportionate to these legitimate aims.

47. After the hearing of the appeal, we identified two further decisions of the Commission, which we considered to be relevant and we gave the parties the opportunity to make written submissions in relation to these. The first was *Swami Omkarananda and the Divine Light Zentrum v Switzerland* (1997) 25 D & R 105. The first applicant was an Indian citizen. The second applicant, DLZ, was a religious and philosophical institution that he had helped to found. Disturbances between DLZ and citizens of the Canton of Zurich led the State Council to order his expulsion, an order extended by the Federal authorities to cover all the territory of the State. Before the order was carried out criminal proceedings were instituted against the first applicant which ultimately resulted in his being sentenced to 14 years imprisonment and 15 years expulsion from Swiss territory. He complained that the order for his expulsion infringed, among others, Articles 9, 10 and 11 of the Convention. The Commission ruled his application inadmissible.

48. The following passages of the decision of the Commission are of relevance:

> "5. …This provision does not in itself grant a right for an alien to stay in a given country. Deportation does not therefore as such constitute an interference with the rights guaranteed by Article 9 (see, mutatis mutandis, decision on Application No. 7729/76, *Agee v the United Kingdom*, Decisions and Reports 7, pp.164, 174), unless it can be established that the measure was designed to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers.
>
> 6. In the present case, the first applicant has not, whilst in the jurisdiction of Switzerland, been subjected by the authorities to any restriction on his rights to manifest his religion, in particular in teaching and worship. The question has been raised nevertheless whether at the time of the expulsion order complained of there were obvious reasons of public order to justify the measure or whether it must be suspected that the main purpose sought was to remove the source of an unwanted faith and dismantle the group of his followers.
>
> The Commission notes however that the expulsion order issued by the cantonal authorities and later extended by the Federal authorities to cover all the territory of the State was never carried out. If the first applicant is ever expelled it will be in pursuance of the judgment of the Federal Criminal Court sentencing him to fourteen years' imprisonment and fifteen years' expulsion from Swiss territory.
>
> Such decision, based on obvious reasons of public order, constitutes an exercise of the discretionary power of deportation reserved to States.
>
> …
>
> 7. The above considerations under Article 9 of the Convention also apply to both applicants' claims under Articles 10 and 11 of the Convention."

49. The other decision, *Adams and Benn v United Kingdom* (1997) 88A D & R, 137 involved a complaint arising out of an exclusion order made against Mr Gerry Adams, the President of Sinn Fein, an Irish citizen resident in Northern Ireland, under the Prevention of Terrorism Act 1989. This excluded him from Great Britain and prevented him from accepting an invitation from Mr Tony Benn to speak to Members of Parliament and a number of journalists in the Grand Committee Room at the House of Commons. Both complained of violation of their Article 10 rights of freedom of expression – the former of the right to impart information and ideas; the latter of the right to receive them.

50. The Commission held at p.144 that Article 10 was engaged:

> "The Commission recalls that the exclusion order imposed on the first applicant prevented him from attending a specific meeting in the House of Commons to which he had been invited by the second applicant. In these circumstances, the first applicant has been subject to a restriction on his freedom of expression and to impart information and ideas, and the second applicant to a restriction on his right to receive information and ideas, within the meaning of the first paragraph of Article 10."

51. The Commission went on at p.145 to consider whether the restriction could be justified under Article 10.2, and decided that it could:

> "In the present case, the restriction complained of prevented the first applicant from attending a specific meeting in London. The Commission notes in that context that the United Kingdom is not a party to Protocol No. 4 to the Convention, which in Article 2 guarantees freedom of movement within the territory of a State. It remained open to the first applicant to express his views by other means or in Northern Ireland and for the second applicant to receive those views. The limitation was thus narrowly confined in its scope in so far as it affected the freedom to receive and impart information. The Commission recalls the sensitive and complex issues arising in the context of Northern Ireland, where there have been ongoing efforts to establish a peace process acceptable to the various communities and parties involved and where the threat of renewed incidents of violence remains real and continuous. It also notes that the exclusion order was lifted following the announcement of a cease-fire by the IRA. In these circumstances, the Commission finds that the decision of the Secretary of State to impose an exclusion order which prevented the first applicant from attending a meeting in London was not disproportionate to the aim of protecting national security and preventing disorder and crime and that it could be regarded as necessary in a democratic society for those purposes."

Discussion

52. We have drawn the following conclusions from the Strasbourg jurisprudence.

53. The right under international law of a State to control the entry of non-nationals into its territory is one which is recognised by the Strasbourg Court. Where entry is refused or an alien is expelled for reasons which are wholly independent of the exercise by the alien of Convention rights, the fact that this carries the consequence

that he cannot exercise those rights in the territory from which he is excluded will not constitute a violation of the Convention.

54. In exceptional circumstances the obligation to protect Convention rights can override the right of a State to control the entry into its territory or presence within its territory of aliens. This is clear from the cases involving Article 8.

55. Where the authorities of a State refuse entry or expel an alien from its territory solely for the purpose of preventing the alien from exercising a Convention right within the territory, or by way of sanction for the exercise of a Convention right, the Convention will be directly engaged. This proposition is implicit in the observations of the Commission in *Agee* and *Omkarananda* and is expressly supported by the decision of the Court in *Piermont* and by the reasoning of the Commission in *Adams and Benn.* The fact that, in the latter two cases, the complainants were not, or not treated as being, in precisely the same position as aliens for immigration purposes does not detract from the relevance of those decisions.

56. Thus, where the authorities of a State refuse entry to an alien solely to prevent his expressing opinions within its territory, Article 10 will be engaged. In such a situation the application of the provisions of Article 10.2 will determine whether or not the interference with the alien's freedom of expression is justified.

Why has Mr Farrakhan been excluded?

57. In order to see how the principles that we have derived from the Strasbourg jurisprudence apply to the facts of the present case, it is necessary to determine why it is that the Secretary of State has excluded Mr Farrakhan. In considering this question it is not right to have regard solely to the terms of the decision letter of 20 November 2000. That letter was the last of a series written on behalf of the Home Secretary in relation to the application for Mr Farrakhan's admission and must be considered in the context of the earlier letters. Thus it is necessary to have regard to the fact that the Home Secretary carried out the consultation described in the letter of 23 July 1999 and to the large number of unsolicited letters for and against maintaining the exclusion of Mr Farrakhan that he received.

58. The Home Secretary stated in his decision letter that he had taken into account the undertaking signed by Mr Farrakhan and the fact that his current message was one of reconciliation. In these circumstances we do not consider that the reason why the Home Secretary excluded him was simply, or even predominantly, in order to prevent him exercising the right of freedom of expression in this country. We suggested to Miss Carss-Frisk, and she agreed, that, on the evidence, the reason for Mr Farrakhan's exclusion was the risk that his presence in this country might prove a catalyst for disorder. The Home Secretary has advanced as part of the explanation for this risk the fact that 'sections of the community, in particular the Jewish community, clearly associate Mr Farrakhan with anti-semitic views' and that this perception is not without foundation.

59. At paragraph 50 of his judgment, Turner J. remarked that, on a superficial level, this case might appear to bear a striking resemblance to *Otto-Preminger Institute v Austria* (1949) 19EHRR 34. In granting permission to appeal Sedley LJ stated that, in his view, one of the main issues was 'to what extent the licence for local intolerance given by the *Otto Preminger* decision ought to affect judicial review of executive decisions in this country'.

60. In *Otto Preminger* the Strasbourg Court upheld the decision of the Innsbruck provincial court to order the seizure and forfeiture of a film on the ground that its subject matter amounted to an abusive attack on the Roman Catholic religion. The decision has been attacked by some commentators on the basis that it went too far in censoring freedom of expression within a Member State and it is apparent that it is not a decision which finds favour with Sedley LJ. Turner J. considered the resemblance of that case to the present to be superficial because, in *Otto Preminger* there was evidence before the court of the effect that the film would have on the religious majority in the Tyrol, whereas in the present case the Secretary of State has advanced no evidence to justify his decision.

61. If the Home Secretary had excluded Mr Farrakhan simply on the grounds that his character or views made him a person whom a large section of the community would not wish to see within their country, *Otto Preminger* might have been invoked in support of an argument that this did not violate the Convention. But that is not this case. The Home Secretary did not exclude Mr Farrakhan simply because he held views that would be offensive to many. He excluded him because of the effect that he considered that his admission would have on community relations and the risk that meetings attended by him would be the occasion for disorder. For this reason, which is not the same as that of Turner J, we agree that any resemblance between this case and *Otto Preminger* is superficial.

62. Although preventing Mr Farrakhan from expressing his views was not the primary object of his exclusion, the fact remains that the Home Secretary did not wish him to address meetings in this country because he considered that such meetings might prove the occasion for disorder. To this extent, one object of his exclusion can be said to have been to prevent him exercising the right of freedom of expression in this country. In these circumstances, which are not precisely covered by the Strasbourg authorities to which we have referred, we consider that Article 10 of the Convention was in play. The Home Secretary was correct to recognise this in his decision letter, which also recognised the importance that is accorded to freedom of speech by the common law.

The approach to judicial review

63. The Home Secretary made it plain that he was balancing the importance of freedom of speech against the risk of disorder that might ensue if Mr Farrakhan were admitted into this country. That was an appropriate approach, for Article 10.2 recognises that the prevention of disorder is one of the legitimate aims that can justify placing restrictions on freedom of expression. Much argument before Turner J and before us was directed to the approach in such circumstances to judicial review of the Secretary of State's decision.

64. Before the Human Rights Act 1998 came into force, the approach to judicial review in this country involved the application of the test in *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. It was only appropriate for the court to overturn an administrative decision if it was one which no reasonable decision maker could have reached. Using the language of the Strasbourg jurisprudence, this test left a very wide margin of appreciation to the decision maker. Indeed, the margin was far too wide to accommodate the demands of the Convention. In deciding whether restriction of a Convention right can be justified, it is necessary to apply the doctrine of proportionality. In applying that doctrine, the width of the margin of appreciation that must be accorded to the decision maker will vary, depending upon the right that is in play and the facts of the particular case. Applying a margin of appreciation is a flexible approach; the *Wednesbury* approach is not.

65. For this reason, in cases involving Convention rights, the courts have moved from the *Wednesbury* test towards the application of the principle of proportionality, via the stepping stone of the judgment of Sir Thomas Bingham MR in *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 at 554. The following passage in the speech of Lord Steyn in *R(Daly) v Home Secretary* [2001] 2AC 532 at 547 is now generally accepted as the best source of guidance in judicial review cases where human rights are in play:

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > 'Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, Administrative Law, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted.

> But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."

66. In the same case at p.549 Lord Cooke of Thorndon, who agreed with Lord Steyn, suggested that it was not merely in cases involving fundamental rights that the *Wednesbury* test should be replaced with a more flexible approach:

> "I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

67. When applying a test of proportionality, the margin of appreciation or discretion accorded to the decision maker is all important, for it is only by recognising the margin of discretion that the court avoids substituting its own decision for that of the decision maker. In the context of considering the margin of discretion in the present case, it is necessary to deal with the other matter which Sedley LJ considered to be a major issue in this case, the effect of Article 16

Article 16

68. Article 16 provides: 'Nothing in Articles 10,11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'. The Secretary of State referred inferentially to Article 16 in his decision letter. There is almost no reference to it in the Strasbourg jurisprudence. In *Piermont* the Commission made the following comments about it:

> "The Commission observes that in placing this article in the Convention those who drafted it were subscribing to a concept that was then prevalent in international law, under which a general, unlimited restriction of the political activities of aliens was thought legitimate.
>
> The Commission reiterates, however, that the Convention is a living instrument, which must be interpreted in the light of present day conditions, and the evolution of modern society."

69. As we have noted, the Commission and the Court held that, having regard to the status of Mrs Piermont, the Article had no application.

70. Mr Blake submitted that Article 16 is, by its terms, directed at permissible restrictions on the political rights of aliens in the host country and seems designed to preclude a discrimination challenge where less favourable treatment is accorded to aliens than others after admission. We agree that this conclusion is consistent with the wording of Article 16 and of Article 1 of the Convention. On this basis this Article appears something of an anachronism half a century after the agreement of the Convention. We do not consider that it has direct impact in the present case.

The margin of discretion

71. Miss Carss-Frisk submitted that there were factors in the present case which made it appropriate to accord a particularly wide margin of discretion to the Secretary of State. We agree. We would identify these factors as follows. First and foremost is the fact that this case concerns an immigration decision. As we have pointed out, the Strasbourg Court attaches considerable weight to the right under international law of a State to control immigration into its territory. And the weight that this carries in the present case is the greater because the Secretary of State is not motivated by the wish to prevent Mr Farrakhan from expressing his views, but by concern for public order within the United Kingdom.

72. The second factor is the fact that the decision in question is the personal decision of the Secretary of State. Nor is it a decision that he has taken lightly. The history that we have set out at the beginning of this judgment demonstrates the very detailed consideration, involving widespread consultation, that the Secretary of State has given to his decision.

73. The third factor is that the Secretary of State is far better placed to reach an informed decision as to the likely consequences of admitting Mr Farrakhan to this country than is the Court.

74. The fourth factor is that the Secretary of State is democratically accountable for this decision. This is underlined by the fact that s.60(9) of the 1999 Act precludes any right of appeal where the Secretary of State has certified that he has personally directed the exclusion of a person on the ground that this is conducive to the public good. Mr Blake submitted that the absence of a right of appeal required a particularly

rigorous scrutiny under the process of judicial review. This submission appeared to us tantamount to negating the effect of s.60(9). There is no doubt that the Secretary of State's decision is subject to review, but we consider that the effect of the legislative scheme is legitimately to require the Court to confer a wide margin of discretion upon the Minister.

75. These conclusions gain support from the approach of the House of Lords to the discretion of the Secretary of State to deport a person on grounds of national security in *SHDD v Rehman* [2001] 3WLR 877.

76. Miss Carss-Frisk submitted that these considerations were not reflected in the judgment of Turner J., but that he had replaced his own evaluation of the relevant facts for that of the Minister. We consider that there is force in this submission.

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

78. Sedley LJ described the grounds for excluding Mr Farrakhan as exiguous. We have already indicated that to ascertain the reasons for Mr Farrakhan's exclusion it is appropriate to have regard to all the correspondence on the subject written by or on behalf of the Secretary of State. The Home Secretary's decision had turned upon his evaluation of risk – the risk that because of his notorious opinions a visit by Mr Farrakhan to this country might provoke disorder. In evaluating that risk the Home Secretary had had regard to tensions in the Middle East current at the time of his decision. He had also had regard to the fruits of widespread consultation and to sources of information available to him that are not available to the Court. He had not chosen to describe his sources of information or the purport of that information. We can see that he may have had good reason for not disclosing his sources but feel that it would have been better had he been less diffident about explaining the nature of the information and advice that he had received.

79. We consider that the merits of this appeal are finely balanced, but have come to the conclusion that the Secretary of State provided sufficient explanation for a decision that turned on his personal, informed, assessment of risk to demonstrate that his decision did not involve a disproportionate interference with freedom of expression. The Secretary of State exercised a power expressly conferred upon him by Immigration Rule 320(6), whose terms are reflected in s.60(9) of the 1999 Act. He did so for the purpose of the prevention of disorder, which is a legitimate aim under Article 10.2 of the Convention. His decision struck a proportionate balance between

that aim and freedom of expression, to the extent to which that was in play on the facts of this case. This appeal will, accordingly be allowed.

Order:

1. Appeal allowed

2. Appellants to pay 50% of Respondent's costs of the appeal. Secretary of State to have costs of hearing below.

3. Leave to appeal to House of Lords refused

(Order does not form part of the approved judgment)