Case No: CO/8625/2010

Neutral Citation Number: [2010] EWHC 2825 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2010

Before :

MR JUSTICE CRANSTON

- -

Between :

Dr Zakir Naik	**Claimant**
- and -	
(1) The Secretary of State for the Home Department	**Defendants**
(2) Entry Clearance Officer, Mumbai, India	

- -
- -

Raza Husain QC, Matthew Ryder QC and Duran Seddon (instructed by **ITN Solicitors**) for the **Claimant**
James Eadie QC and Jeremy Johnson (instructed by **Treasury Solicitors**) for the **Defendants**

Hearing dates: 20, 21 October 2010

- -

Judgment

Mr Justice Cranston:

INTRODUCTION

1. Dr Naik, the claimant, is a leading Muslim writer and public speaker. He has made a number of statements which the Secretary of State regards as being on their face supportive of Osama Bin Laden, anti-Jewish and otherwise unacceptable. She is also concerned about reports suggesting that Dr Naik's broadcasts may have influenced those who have instigated terrorist attacks. On 16 June 2010 she decided to exclude him from the United Kingdom. The decision was made under the Secretary of State's personal power to exclude non-nationals from this country on the grounds that it is conducive to the public good and the Home Office's published policy on "unacceptable behaviours". In this judicial review Dr Naik challenges the Secretary of State's decision. Dr Naik also challenges the consequent decision on 17 June 2010 to revoke his entry clearance visa; the confirmation on 25 June of the exclusion decision; and the final decision by the Secretary of State dated 9 August 2010, made following a reconsideration of his representations, to confirm Dr Naik's exclusion from the United Kingdom. The four broad grounds of challenge are breach of legitimate expectation, procedural unfairness, violation of the right to freedom of expression pursuant to article 10 of the European Convention on Human Rights ("ECHR" or "the Convention"); and the failure to give sufficient reasons, to take account of all relevant circumstances and to act rationally.

BACKGROUND

The claimant and his interests

2. Dr Zakir Naik is a national of India, born in 1965. He graduated in medicine from the University of Mumbai. Since then he has become a figure of significant influence in the Muslim world, whose public appearances frequently attract crowds of many thousands. Over the past 13 years, Dr Naik has delivered more than 1,300 public addresses around the world. A particular feature of them is the associated question and answer sessions. Over 100 of his talks, dialogues, debates and symposia are available on recordings. Since 2007, he has organised an annual international peace conference in Mumbai, which now attracts over one million people. Dr Naik is the author of books on Islam and comparative religion. He has participated in symposia with leading figures of other faiths. In a list of the top 10 spiritual gurus of India, published in the Indian Express in 2010, Dr Naik was listed first. In an article published in the Sunday Express on 22 February 2010, Dr Naik was ranked 89 in a list of the 100 most powerful Indians of 2010. In her letter to MPs on 17 June 2010 the Minister of State for Security, Rt Hon Baroness Neville-Jones, described Dr Naik as a leading Muslim writer and public speaker.

3. In 1991 Dr Naik established the Islamic Research Foundation, a non-profit making organization based in Mumbai. Dr Naik is president of the foundation. The foundation promotes Da'wah, the proper presentation, understanding and appreciation of Islam. Dr Naik is also chairman of the Islamic Research Foundation International ("IRFI"), a charity based in the United Kingdom and regulated by the Charity Commission. Dr Naik is the chairman and director of Harmony Media, a not for profit media production company in India, constituted under Indian Law. He is also the director and chairman of Global Broadcasting Corporation, a not for profit broadcast

company constituted in Dubai. Universal Broadcasting Corporation Ltd ("UBCL") is a non profit making company in the United Kingdom, limited by guarantee. Dr Naik is a director and chairman. UBCI wholly owns Lords Production Inc Ltd, a non profit making company in the United Kingdom, which holds the broadcast licence for Peace TV. The broadcasts on this channel are public talks to advance the faith and practice of Islam. The Peace TV channel is transmitted using the BSkyB platform across the United Kingdom and Europe and also provides feeds for the United States. Peace TV has a studio presence in the United Kingdom and India and is regulated by OFCOM in the United Kingdom. IRFI provides some funding for Peace TV.

4. In the course of his role as a public speaker on Islam Dr Naik made a number of public pronouncements in the decade following 1997, which are relevant to the decisions challenged in these proceedings. As identified by the Secretary of State these are as follows:

> "Statement 1: As far as a terrorist is concerned, I tell the Muslims that every Muslim should be a terrorist... What is the meaning of the word terrorist? Terrorist by definition means a person who terrorises. When a robber sees a policeman he's terrified. So for a robber, a policeman is a terrorist. So in this context, every Muslim should be a terrorist to the robber... Every Muslim should be a terrorist to each and every anti-social element. I'm aware that terrorist more commonly is used for a person who terrorises an innocent person. In this context, no Muslim should even terrorise a single innocent human being. The Muslims should selectively terrorise the anti-social element. And many times, two different labels are given to the same activity of the same individual... Before any person gives any label to any individual for any of his actions, we have to first analyse, for what reason is he doing that?
>
> Statement 2: Beware of Muslims saying Osama Bin Laden is right or wrong. I reject them... we don't know. But if you ask my view, if given the truth, if he is fighting the enemies of Islam, I am for him. I don't know what he's doing. I'm not in touch with him. I don't know him personally. I read the newspaper. If he is terrorising the terrorists, if he is terrorising America the terrorist, the biggest terrorist, every Muslim should be a terrorist. The thing is, if he's terrorising a terrorist, he's following Islam.
>
> Statement 3: How can you ever justify killing innocent people? But in the same breath as condemning those responsible we must also condemn those responsible for the deaths of thousands of innocent people in Iraq, Afghanistan and Lebanon.
>
> Statement 4: If you are going to ask and say that based on the news that I get from the media, whether it be BBC, CNN, etc, then if I agree with that news I have no option but to label [Osama bin Laden] a terrorist, but the glorious Quran says...

whenever you get information about something, check it out before you pass it to the second person or the third person. As far as Osama bin Laden is concerned... I cannot base my answer just on the news reports, unless the news reports are verified. But one thing I can say for sure that he was always called as a prime suspect on CNN... prime suspect number one – no proof. Based on the reports of CNN and BBC, I cannot say that he is a terrorist at all. I am neither saying he is good, and neither saying he is bad.

Statement 5: Strongest in enmity towards the Muslims are the Jews and the pagans... It [The Quran] does not say that the Muslims should fight with the Jews... the Jews, by nature as a whole, will be against Muslims... there are many Jews who are good to Muslims, but as a whole... The Quran tells us, as a whole, they will be our staunchest enemy.

Statement 6: It is a blatant secret that this attack on the twin towers was done by George Bush himself.

Statement 7: Today, America is controlled by the Jews, whether it be the banks, whether it be the money, whether it be the power. Nobody can become a president of the USA without walking the Star of David.

Statement 8: American citizens themselves have a hundred other hypotheses for who is the person who was responsible for September 11th. You go on to the internet... American journalists, American historians... this thing could not have been done by bin Laden... I'm not saying what they're saying is wrong, or what they're saying is right, I don't know. I'm just giving you information that you might not be aware... Some of the people even say that George Bush himself did it.

Statement 9: The pig is the most shameless animal on the face of the earth. It is the only animal that invites its friends to have sex with its mate. In America, most people consume pork. Many times after dance parties, they have swapping of wives; many say, 'you sleep with my wife and I will sleep with your wife.' If you eat pigs, then you behave like pigs.

Statement 10: If a Muslim becomes a non-Muslim and propagates his/her new religion then, it is as good as treason. There is a 'death penalty' in Islam for such a person. Punishment is death. In many countries the punishment for treason is also death. If an army general discloses his army's secrets to another country then there is a 'death penalty' or life imprisonment for such a person according to the laws of most of the countries. Similarly if a Muslim becomes non-Muslim and propagates his/her new religion then there is a 'death penalty' for such a person in Islam.

> Statement 11: If a person does not want peace to prevail what can we do?... We have to be careful of the Jews. Not ever fight them, unless they come and fight you. That's a different thing. Imagine what's happening in Palestine, what's happening in other parts of the world, so brothers, for peace to prevail you have to follow the guidance of the Quran... The Quran doesn't say the Jews should be enemies but they will be so."

5. The Secretary of State also draws attention to reports which suggest that Dr Naik's public statements may have been influential on those who have engaged in terrorist activities. Thus there are reports in India which link his broadcasts to the perpetrators of the Mumbai terror attacks:

> "An examination of the [file sharing] accounts common across these four internet sites [suspected to have been used by the Mumbai terrorists] reveal common jihadi videos, references to Mumbai and Bangalore as base locations and videos of founder and president of the Islamic Research Foundation Zakir Naik's speeches."

Feroze Ghaswala, an early recruit of Mohamed Rashil Sheikh, one of those thought to be behind the 2006 Mumbai train bombings, has also been linked to Dr Naik's meetings:

> "Ghaswala travelled to Srinagar, hoping to meet jihadists at a religious gathering addressed by neoconservative preacher Zakir Naik in 2003. Instead, he ran into Sheikh – starting a journey which ended with his arrest in New Delhi."

Kafeel Ahmed, one of those behind the failed attack on Glasgow airport in 2007, reportedly hoped to invite Dr Naik to address his own group, known as Discover Islam. Najibullah Zazi, an Afghan charged with conspiracy to use weapons of mass destruction in the US, reportedly became enchanted with "the controversial Indian Muslim televangelist Dr Zakir Naik" before planning his attack. Dr Naik emphatically rejects the link between him and these terrorist activities.

Visits to the UK 1990-2009

6. Since 1990, Dr Naik has visited the United Kingdom on some fifteen occasions. The first visit, in May 1990, was under a 6 month visit visa. Subsequently he was issued with visitor visas, allowing multiple entry. During a visit in 1998 Dr Naik gave public lectures at various mosques and Islamic cultural centres. There were also personal visits. In August 2001, the Deputy British High Commission in Mumbai granted a multiple entry 5 year visitor visa. Under that visa Dr Naik conducted public lecture tours in September 2001, in March and December 2002 and in August and December 2005. The lectures were given in various places in the United Kingdom, including London, Birmingham, Bradford and Manchester.

7. In July 2006 Dr Naik was given a two year visitor visa. Public lecture tours followed. During the August 2006 lecture tour there was some adverse publicity in advance of Dr Naik's lecture at St David's Hall, Cardiff. David Davies, then Member of

Parliament for Monmouth, was quoted in the Western Mail as calling on Cardiff County Council "to prevent this hate-monger from having a platform for his obnoxious views". The council told the newspapers that it had made further inquiries and had no reason to suspect that the event would be used as a platform for extremist views or constitute a threat to public security. There was an especially well publicised tour in February 2007. In June 2008 the Deputy British High Commission in Mumbai issued Dr Naik with a 5 year business visit visa, allowing multiple entry. As with all the visas issued to Dr Naik by the visa section of the Deputy British High Commission in Mumbai, the Secretary of State was not involved nor was there consideration of the public statements which Dr Naik had made.

8. After the 5 year visa issued in mid 2008 Dr Naik visited the United Kingdom on his fourteenth visit. That occurred over a 5 day period in late July - early August 2008. Again he gave talks on Islamic themes at gatherings of between 50-300 people, this time in London, Preston and Manchester. In December 2008, Dr Naik's name was added to the Mumbai local alert list used by the Deputy British High Commission when issuing visas. There is no detailed record as to why that happened. Nothing was done about Dr Naik's existing visa. It is not known whether the visa section in Mumbai considered whether any steps such as revoking the visa should be taken. The case was not referred to the UK Border Agency's Special Cases Directorate in London. In July 2009 Dr Naik visited this country for the fifteenth time and during a 3 day period gave a lecture in London.

The planned July 2010 visit

9. Plans were made for Dr Naik to give lectures at major events at the Sheffield Arena, Wembley Arena and the Birmingham National Exhibition Centre in late June-early July. It was thought that the three events would attract a total of approximately 45,000 people. Preparations for the events involved considerable organisation and investment. During his time here Dr Naik was also to attend meetings of his various United Kingdom based companies and charities. He was also to have recorded programmes which would provide material suitable for broadcasting by Peace TV.

10. The Foreign and Commonwealth Office became aware of these planned events on 25 May 2010 and contacted the UK Border Agency's Special Cases Directorate the following day. The upshot was that research was commissioned into Dr Naik's background and profile. At this point the director general of the Office for Security and Counter Terrorism ("OSCT"), Charles Farr, was informed. That office has lead responsibility for the government's "Prevent" Counter Terrorism strategy. One aspect of that is community engagement.

11. On 30 May 2010 the Sunday Times published an article entitled 'Muslim preacher of hate is let into Britain'. It contained various allegations about Dr Naik. There were similar articles in other newspapers between 31 May and 1 June. Some referred to the issue of Dr Naik's admission to the United Kingdom as being a "political test" for the Prime Minister and the Home Secretary. The Sunday Times article referred explicitly to what are statements 2 and 9 above and may have alluded to statement 4, 6, 8 and 10. On one reading the article covered statement 1. The article also referred to reports in the Indian media that Dr Naik's organisation, the Islamic Research Foundation in Mumbai, was where Rahil Abdul Rehman Sheikh, suspected of being commander of a series of train bombings in Mumbai, and other alleged terrorists spent

much of their time before the attacks. It added: "The American terror suspect Najibullah Zazi, arrested last year for planning suicide attacks on the New York subway, is said to have been inspired by Naik's YouTube videos. There is no suggestion Naik had any knowledge of terrorist plotting."

12. As a result of the media coverage between 3 June and 20 June there were discussions between Dr Naik's representatives and the Home Office. There was a meeting on 3 June, facilitated by Sir Iqbal Sacranie. Attending for Dr Naik were Bashir Sattar, Mustasam Abassi and Jafer Qureshi. The government was represented by Charles Farr, Sabin Khan, and Debbie Gupta, director of 'Prevent' within OSCT. There is a dispute about what was said at that meeting and in the discussions. It is not necessary for me to resolve these factual issues. The legality of the Secretary of State's decision does not depend on which witnesses' accounts of discussions between officials and Dr Naik's associates are accurate. There is no substantial dispute about the factual material available to the Secretary of State to make the decision.

13. On 3 June 2010, Dr Naik sent a lengthy document to the Home Office. It refuted the newspaper materials. It said that Dr Naik was renowned for his enlightening and convincing presentations on the similarities between major faiths and was world renowned for his attempts in bringing people together on one common platform of peace. There was a deliberate attempt to misrepresent him and damage his reputation by portraying him as a "preacher of hate" and a "terror backer". The claims made in the newspapers were unjustified and the allegations were absolutely false and a misrepresentation of the truth. The newspapers had quoted from some of his lectures out of context. For example, when he had said that Western women were more susceptible to rape by wearing revealing clothes, that was not made out of hatred to women but from concern. He did not believe that the death penalty was automatic for a Muslim rejecting his faith. In saying that every Muslim should be a terrorist he was not referring to terrorism but to the need to cause anti-social elements to feel terrified when they see a Muslim, in the way that robbers or rapists fear the police. The 3 June document then turned to Dr Naik's statement about Osama Bin Laden. It was made before the events of 9/11. Dr Naik was unable to say whether Osama Bin Laden is good or bad because he had not seen proof that he was responsible for terrorist activity. There was material that suggested that the American authorities engineered 9/11. As to his influence on those who have planned terrorist atrocities, he could not accept that anything that he had said had caused anyone to behave in an extreme or violent fashion.

14. On 6 June 2010, a statement by Dr Naik was submitted to the Secretary of State. In that statement, Dr Naik stated that his purpose was to respond to the recent press reports about his intended tour to the United Kingdom. His work over the past 18 years, using the Glorious Qur'an and the teachings of the Prophet Mohammed, had focused mainly on the clarification of important issues, including such topics as the status and rights of women, terrorism and the killing of innocent civilians, and the route to peace in Islam. As a student of comparative religion his work has involved engaging in constructive discussion with people of other major faiths. He had spoken out on numerous occasions against all acts of terrorism and had unequivocally condemned such acts of violence. Acts including 9/11, 7/7 and 7/11 (the train bombing in Mumbai) were completely and absolutely unjustifiable on any basis. Recent press reports in the British media had given a warped and wholly unjustified

impression of his work. They were totally untrue and a misrepresentation. The sensational headlines had been based on quotes without the relevant context or which were completely wrong. It was clear from many of his talks that in Islam terrorism, the killing of innocent civilians, was completely forbidden. As such he had unequivocally stated that no Muslim should be a terrorist. Some of the quotes had been taken from edited and manipulated excerpts uploaded onto the YouTube website, including a talk that he delivered in 1996 in Singapore, prior to the 9/11 atrocity. He was currently seeking advice from lawyers in the United Kingdom on taking legal action in the light of these reports. His tour would be focused on delivering a message of peace based on Islamic values and bridging the gap of understanding between the major faiths. His tour would also include a clear and concise message to young British Muslims that terrorism and violent extremism, including suicide bombings killing innocent civilians, was totally unacceptable and had no place in Islamic life.

> "I hope to reach out to all youngsters and persons generally who promote confrontation and violence in the name of Islam; to engage in peaceful and constructive discussion with other communities, authorities and government to deal with any issues or grievances they may be fostering. I also hope to reassure the wider British People that my message to British Muslims is one of integration and service to their Country and fellow citizens, based on the beautiful faith of Islam which was revealed as a guide to living in this world, for the whole of mankind."

15. The statement sent to the Home Office on 6 June was re-issued as a press release by the Islamic Research Foundation on 11 June. Three days later, on 14 June 2010, Peace TV sent a letter from its Birmingham Office to the Home Secretary, Rt Hon Theresa May MP. It expressed concern that following recent misleading reports in the press, she was considering issuing an exclusion order against Dr Naik. Peace TV wished to assure her that Dr Naik was an Islamic scholar who was held in very high regard by millions of Muslims worldwide. Contrary to the recent reports in the press he was also an outspoken opponent of terrorism. During his impending visit he intended to meet members of other faith groups, leaders of local communities and national bodies in order to encourage interfaith and inter-community dialogue. He understood current sensitivities in the United Kingdom, in particular the issues surrounding the radicalisation of some young British Muslims, the phenomenon of violent extremism in the name of Islam, and the very real threat from international and home grown terrorism. Dr Naik wished to reach out to all groups and individuals so as to encourage them to engage with the authorities and fellow citizens on a basis of constructive and peaceful dialogue. He intended to make it absolutely clear that Islam totally prohibited Muslims from engaging in terrorist activities and killing civilians. Dr Naik had spoken in over 30 countries to large audiences and was widely respected and revered for his style of delivery.

16. Should an exclusion order be issued and Dr Naik not be permitted entry into the United Kingdom, the letter continued, it was likely to have an adverse impact on the tens of millions of his fans around the world and the hundreds of thousands here in the UK. Such a decision would be seen as unjust and unfair by the many law abiding and

decent Muslim citizens here. It would also undoubtedly be an opportunity lost for Dr Naik to play a constructive role. Cancellation of the three planned events would result in the loss of hundreds of thousands of pounds of donations and sponsorship monies. The government should permit the visit and seize the initiative of working together with Dr Naik and his team to reach out to more British Muslims to integrate and better serve their country. Peace TV had recently been made aware of the government's Prevent agenda and both it and Dr Naik would welcome the opportunity to work together in tackling violent extremism.

The decision to exclude

17. Dr Naik was due to arrive in the United Kingdom on 18 June 2010. The Home Secretary made the decision to exclude him personally on 16 June 2010. That decision was conveyed to Dr Naik in two letters. The first was a brief letter of 17 June 2010 from the Deputy British High Commission in Mumbai, informing him of the decision and of the revocation of his visa.

> "On 15 July 2008 you were issued a multiple entry visit visa, valid until 15 July 2013. However, on 16 June 2010 the Secretary of State decided to exclude you from the UK for engaging in unacceptable behaviour by making statements that attempt to justify terrorist activity and fostering hatred. On the basis of the Secretary of State's exclusion decision the Entry Clearance Officer has been instructed to revoke your visa in accordance with paragraph 30A(iii) of the Immigration Rules on the grounds that your exclusion from the UK would be conducive to the public good. There is no right of appeal against this decision."

18. The second was a somewhat longer letter of the same date from the UK Border Agency. It began by outlining the unacceptable behaviour policy. Having carefully considered that policy, the letter said, the Home Secretary had personally directed that Dr Naik should be excluded from the United Kingdom on the grounds that his presence here would not be conducive to the public good. The Home Secretary noted that he had made "the following statements amongst others". Set out were statements 1-3 and 5 above. In expressing such views, the letter continued, the Home Secretary considered that Dr Naik's comments fell within the behaviours in the policy and that in particular he was justifying terrorist violence and fostering hatred. She therefore considered that his views were unacceptable and that should he be allowed to enter the United Kingdom he might continue to espouse such views. In light of these factors she was satisfied that he should be excluded from the United Kingdom on the grounds that his exclusion was conducive to the public good. There was no right of appeal although the decision would be reviewed after no later than three years. His visit visa had been revoked and he should therefore not attempt to travel to the United Kingdom as he would be refused entry.

19. On 17 June the Security Minister, Rt Hon Baroness Neville-Jones, wrote to MPs explaining the decision in the light of representations they might receive from constituents. Dr Naik was a leading Muslim writer and public speaker, but the Home Secretary had decided to exclude him because she did not consider that his presence here would be conducive to the public good. Exclusion powers were very serious and

no decision was taken lightly or as a method of stopping open debate on issues. The Home Secretary had reached the view that Dr Naik should be excluded on the basis of numerous statements which were evidence of his unacceptable behaviour. The Security Minister summarised the exclusions policy and added that it did not target particular communities or faith groups. The policy had been used to prevent extremists from coming here, whose views and actions were focussed on a range of issues, including racists, animal rights extremists, and others. It was open to Dr Naik to show clearly and consistently over time that he had repudiated the views which he appeared to have expressed and to make representations to the Home Secretary to that effect. In any event the government would review the decision no later than three years hence. The Security Minister attached "a selection" of Dr Naik's statements which the Home Secretary took into account. The three statements attached were statements 1-3 above.

20. On 18 June 2010 Inayat Bunglawala, chair of Mulsims 4 UK, emailed Charles Farr, the director general of OSCT in the Home Office, that the way forward would be in the near future to come to an agreement upon a form of words which made it clear that Dr Naik totally disassociated himself from the kind of extremism of which he was accused, thereby allowing the government to show that progress has been made in resolving the issue of problematic statements from the past. By return email Charles Farr broadly agreed.

21. A cogent and detailed letter from the claimant's solicitors, dated 23 June 2010, canvassed a variety of matters, including the legitimate expectations submission before me. It recorded Dr Naik's view that the statements relied on in the 17 June letter were incomplete and lacked context and understanding. The letter also identified as a purpose of the letter a request to the Home Secretary to rescind the exclusion, at least to enable Dr Naik to conduct his planned visit to the United Kingdom and, if she so wished, without prejudice to any future action she might take against him. The letter also explained that two of the passages in the United Kingdom Border Agency letter (statements 2 and 3 above) were sourced to 2006, the other two being undated. However, passage 1 (statement 1 above) appeared to be taken from comments made in 2002, while passage 4 (statement 5 above) from what had been said in November 2007. Thus all four passages were made prior to the grant of the multiple entry visa clearance in mid 2008. Moreover, passage 2 (statement 2 above), citing comments made by Dr Naik concerning Osama Bin Laden, appeared to be taken from a lecture given in 1998, not 2006 as indicated in the letter, in other words some three years before the events of 9/11. Severe financial and reputational damage would follow should the Secretary of State not reverse her decision.

22. The Treasury Solicitor responded to that letter on 25 June 2010. In line with the decision of 16 June, it said, the Home Secretary rejected the request for Dr Naik to be allowed into the United Kingdom to attend a number of planned conferences. A letter before claim was sent, dated 12 July 2010. Paragraph 36 required a withdrawal of the exclusion order and the decision to revoke the visa. The Treasury Solicitor responded with a number of holding letters. In one of these, dated 2 August, the Treasury Solicitor wrote that the letter before claim was being "put before the Home Secretary for her to consider your client's case in light of the further representations you have made subsequent to the decision of 17 June 2010."

23. The substantive response to the letter before claim came on 9 August 2010.

> "The Secretary of State has carefully reviewed the material and the representations Dr Naik has now provided. She does not accept any of the grounds of challenge you put forward; and will not be taking the actions sought by paragraph 36 of your letter. She has therefore confirmed her earlier decision that Dr Naik's exclusion from the United Kingdom should be maintained."

The letter proceeded to reject the legal bases of the challenge advanced in the letter before claim. It was well established that states have a discretion as to who enters their borders, reflected in the broad power to exclude on the basis of non conduciveness. It was for the Secretary of State to determine whether the threshold for exclusion had been met; she had a wide discretion when so doing. The unacceptable behaviours policy provided "an indicative guide as to some types of behaviour that would normally be considered as providing grounds for exclusion". The fact that Dr Naik had communicated views covered by the policy and might do so again if allowed into the United Kingdom was a sufficient and reasonable basis for the Secretary of State to take the decision she has. The Secretary of State had considered with care and an open mind the representations as to whether she should maintain the earlier decision. The letter then said:

> "8. The decision to exclude has been taken having considered a large number of comments made by Dr Naik over a number of years. The letter of 17 June 2010 from UKBA set out some of these comments but recognised they were amongst others. Some others are detailed in Annex A to this letter. The comments considered by the Secretary of State include comments referred to in paragraph 27 of your letter of 12 July 2010. The Secretary of State is aware that the comments identified in paragraph 27(2) of your letter of 12 July were made before 2001 (and not in 2006). They were considered in that light. Similarly, the Secretary of State is aware of statements described as condemning terrorist violence that have been made by Dr Naik. She has noted, and accepts, that he has made a number of such statements. She is also aware of, and took into account, Dr Naik's comments about the purpose of his visit to the UK as set out in the statement of 5 June 2010; the points raised by Dr Naik's representatives in discussion with the Home Office and the points set out in the document dated 11 June 2010; and the offer of an undertaking referred to in the letter of 23 June 2010. She has also considered reports regarding third parties and organisations that link the statements of Dr Naik to support their own extremist views. Some examples are detailed in Annex B."

24. Paragraph 9 of the letter continued with the Secretary of State's conclusions on the material to which paragraph 8 referred. Those were firstly that Dr Naik has made a number of statements plainly within the unacceptable behaviours policy. Secondly, Dr Naik has made other statements which, whether they would do so or not, were divisive and potentially damaging to community relations and were inconsistent with

his assertions that his message was one of tolerance and building bridges between faiths. Thirdly, the revision of the unacceptable behaviours policy in October 2008 highlighted the burden on those, such as Dr Naik, who sought to distance themselves from earlier statements.

> "Whilst recognising that some recent public statements by Dr Naik have moved away from some of the past statements (and also that some of those statements were made some years ago), the Secretary of State is not satisfied that that burden has been met. She does not consider that, viewing his statements as a whole, Dr Naik has clearly, unambiguously, consistently and publicly condemned terrorist violence and repudiated his extremist views despite the many opportunities he has had to do so. She remains to be convinced that his message is a non-extremist and conciliatory one as he now asserts. Her view remains that he might continue to communicate the sorts of views he has espoused in the past were he to be admitted to the UK."

In the light of these conclusions, the Secretary of State was not persuaded that the undertaking offered should cause her not to exclude him. Finally, in all the circumstances, her view remained that Dr Naik's exclusion was conducive to the public good.

25. For the avoidance of doubt, the Secretary of State then said in paragraph 10 that she had also considered, as part of the overall judgment, the points Dr Naik made about possible escalation of community tensions as a result of excluding him, and there being people who wished to listen to his views. As to the former, the Secretary of State's view was that any possible risk of such escalation would be outweighed by a greater risk of escalation of that kind were he to be admitted. As to the latter, people who wanted access to his views could continue to do so through his publications and other media.

26. This judicial review was lodged on 12 August 2010. The Secretary of State's Acknowledgment of Service is dated 3 September 2010. Nicol J ordered a rolled-up hearing on 15 September 2010. There were applications by the Islamic Dawah Centre International, which was involved in organising Dr Naik's appearance at the Birmingham National Exhibition Centre, and Rev Masih, who objected to Dr Naik's visit, to be joined. Sales J refused both applications because both were late, because both had omitted to canvass the parties as to whether if they intervened the planned hearing would still be feasible and, because, in the case of the application by the Islamic Dawah Centre, Dr Naik would be able to advance the existing grounds fully and effectively. Dr Naik's case has attracted a number of letters of support.

Dr Naik's second statement

27. Dr Naik has made two statements for the purpose of these legal proceedings. After some introductory material, Dr Naik's second statement contains a lengthy account of his repudiation of violent extremism and terrorism. After setting out some of the material he sent to the Home Secretary, there is detailed reference to his lectures and question and answer sessions. For example the lecture, "Is Terrorism a Muslim

Monopoly" (2006), is summarised. A copy is attached to the statement. The lecture contends that not only is terrorism not confined to those of Muslim faith, it is prohibited by Islam. That follows from a proper interpretation of the Qur'an, which condemns all forms of terrorist activity. 9/11 in the United States, 7/7 in London and a number of terrorist incidents in India are condemned. It was not confirmed that 9/11 or 7/7 were committed by Muslims, but irrespective of who was involved the taking of innocent human life was wrong. Similarly, Dr Naik condemned the military intervention in Iraq and Afghanistan. To someone who said they wanted to kill George Bush, he could not agree. Two wrongs did not make a right. Reacting by using terrorism simply undermined and damaged Islam.

28. In the question and answer session following the lecture, one questioner wished to know what one was to do when subject to attack. His answer was that, even if the natural way to respond was to strike out, it was the Muslim's faith in Islam which held them back and prohibited them from any form of extreme violence. He worked with police forces all over the world. He had repeated the condemnation of terrorism many times before and after the "Is Terrorism a Muslim Monopoly" lecture. Dr Naik then expresses his willingness to work with the United Kingdom government to oppose violent extremism. He recalls the statement he made on 5 June 2010, reproduced in the 11 June press release, that his UK tour was to be focused on a message of peace.

29. Dr Naik's second statement continues with a detailed explanation of the 11 statements set out earlier. (I use the numbering above. Dr Naik labels the statements slightly differently). In broad terms he seeks to place each statement in context. In some cases that context is the entire content of the statement; in others it is other passages in the same speech; and in yet others it is the theme of other lectures which condemn extremist violence and terrorist activity.

30. Thus it is clear, says Dr Naik, that when considering statement 1 as a whole the words "every Muslim should be a terrorist" cannot be read as supporting terrorist violence. His condemnation of terrorism was apparent from the generality of the lecture and the question and answer session which followed where he gave a further explanation of terrorising the anti-social elements. The sentiments in statement 2, from 1998, about Osam Bin Laden, had not been repeated since the events of 9/11, because Dr Naik was aware that to do so might give the impression that he was supportive of terrorist attacks against the United States. It was difficult to see how statement 3 condemning the killing of innocent people in Iraq, Afghanistan and Lebanon could be interpreted as justifying terrorist violence and fostering hatred. In the talk from which it was taken the immediately preceeding passage condemned the terrorist outrages of 9/11, 7/7 and the Bombay train bombings. The Qur'an says that one cannot condemn someone without solid proof, hence statement 4. In any event, that did not go to Dr Naik's condemnation of the attacks themselves.

31. Statement 5, about a passage in the Qur'an on Muslims and Jews, should not be interpreted as an attempt to generate or encourage hostility between the two when the interpretation placed on it is more benign than rendered by a literal approach. The statement should also be placed in the context of his frequent condemnation of Hitler. Statements 6 and 8, about the 9/11 attacks being perpetrated by George Bush, simply drew attention to widely circulated material to this effect. The full sentence from which statement 6 is taken does not unequivocally say that George Bush was

responsible. The statements must also be read in the context of the observation that the Qur'an is against persons being condemned without solid proof.

32. Statements 7 and 11 (America being controlled by Jews and conflict with Jews) are explained by Dr Naik's general purpose to allay fears and debunk the suggestion that Muslims and Jews have to be enemies. That is even clearer when the full passage from which statement 11 is taken is examined, that Islam is the religion of peace. Statement 9, about pigs, reflects the condemnation of eating pork in the Qur'an. Statement 10, on the penalty for conversion, does not reflect Dr Naik's complete view. Unlike other Muslim scholars, Dr Naik teaches against the death penalty for leaving the faith or conversion.

33. As to the reports to which the Secretary of State draws attention of extremists who were inspired by his words, Dr Naik cannot see how any reasonable and proper understanding of them could give support or encouragement to terrorist activity. Thus report two is sketchy and on its own terms hardly suggests that the person was inspired by Dr Naik to terrorism. As to the other report, many hundreds of thousands use the facilities of the Islamic Research Foundation and have attended or heard his talks.

LEGAL FRAMEWORK

Legislation and Immigration Rules

34. Section 3(1)(a) of the Immigration Act 1971 provides that a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so. Leave to enter may be given by way of a grant of entry clearance: Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, as amended, Article 4. To qualify for entry clearance an applicant must satisfy the requirements of the Immigration Rules. A person applies at a post overseas where an entry clearance officer considers the application. For visa nationals entry clearance takes the form of a visa.

35. The Immigration Rules include general grounds of refusal. Paragraph 320 provides additional grounds for the refusal of entry clearance or leave to enter set out in Parts 2-8 of the Rules. Pursuant to paragraph 320(6) an applicant is to be refused where the Home Secretary has personally directed their exclusion on non conducive grounds.

> "Grounds on which entry clearance or leave to enter the United Kingdom is to be refused
>
> ...
>
> (6) where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good;
>
> ..."

Guidance issued to entry clearance officers relating to paragraph 320(6) suggests that, where a refusal is appropriate, high profile cases should be referred to the Home Secretary: Entry Clearance Guidance, RFL 8.1.

36. In addition to this power of the Home Secretary paragraph 320(19) provides that entry clearance, for leave to enter, will normally be refused:

> "…where, from information available … it seems right to refuse leave to enter on the ground that exclusion from the United Kingdom is conducive to the public good; if, for example, in the light of the character, conduct or associations of the person seeking leave to enter it is undesirable to give him or leave to enter."

Guidance to entry clearance officers relating to paragraph 320(19) states that the non-conducive powers apply in a broad range of circumstances and that each case must be considered on its individual merits: Entry Clearance Guidance RFL9.1-4. Examples of such refusals in the Guidance are where a person's admission might lead to an infringement of United Kingdom law or a breach of order and their holding of extreme views which, if expressed, may result in civil unrest resulting in a legal infringement. The same guidance indicates that any potential high profile non-conducive refusals must be referred to the Entry Clearance Complex Case Advice Team.

37. When entry clearance has been granted, entry clearance officers are empowered to revoke it, under paragraph 30A(iii) of the rules, if satisfied that the holder's exclusion would be conducive to the public good. The power of revocation may be exercised by entry clearance officers independently. Guidance stipulates that they should have strong evidential grounds: Entry Clearance Guidance, ECB 18.2. Further, immigration officers are empowered to examine passengers arriving in the United Kingdom in possession of an entry clearance for the purposes of determining whether it would be conducive to the public good for the leave granted by it to be cancelled and to cancel that leave if that is the case: Immigration Act 1971, Schedule 2, para 2A(1),(3),(8). The rules provide for immigration officers to refuse leave to enter to a person in possession of an entry clearance where they are satisfied that refusal is justified on conducive grounds: para 321 (iii). After a person's admission, the Home Secretary may curtail leave under paragraphs 322(5) and 323(i)-(ii) of the rules on the grounds of the undesirability of permitting the person to remain in the country in the light of their character, conduct or associations, or the fact that they cease to meet the requirements of the rules on which leave was granted. Persons may also be deported if the Home Secretary deems that to be conducive to the public good: Immigration Act 1971, section 3(5).

38. Sections 82(1) and 82(2)(a) and (b) of the Nationality, Immigration and Asylum Act 2002 give a right of appeal against a refusal of leave to enter and a refusal of entry clearance. Under section 84(1) an appeal under section 82(1) against an immigration decision must be brought, inter alia, on grounds that the decision is unlawful as discrimination by a public authority or as being incompatible with the person's Convention rights. However, section 98(2) provides that an appeal may not be brought if the Secretary of State certifies that the decision to refuse the person leave to enter or entry clearance was taken in accordance with a direction made personally by the Secretary of State that leave to enter or entry clearance should not be granted on the ground that exclusion from the United Kingdom is conducive to the public good. It follows that, where the Secretary of State has certified the decision under section 98(2)(b), there is no right of appeal against the Secretary of State's decision or against

any refusal of leave to enter or entry clearance which is based on the Secretary of State's decision.

The Secretary of State's unacceptable behaviours policy

39. Following the London bombings on 7 July 2005 ("7/7"), the then Secretary of State for the Home Department, Rt Hon Charles Clarke MP, made a statement to Parliament on 20th July 2005 (Hansard, column 1255). He said that since 7 July, many had raised concerns about extremists who sought to come to the country to foment terrorism, or to provoke others to commit terrorist acts. He had reviewed the government's powers to exclude such people. He had powers to exclude individuals on the grounds that their presence in the United Kingdom was not conducive to the public interest. Those powers needed to be applied more widely and systematically both to people before they arrived and when they were here. In recent decades, for all Home Secretaries the criteria for exercising these powers had generally been on grounds of national security, public order or risk to the country's good relations with a third country. In going beyond those grounds, there was a need to tread very carefully in areas related to free speech. However, in the current circumstances he had decided that it was right to broaden the use of these powers to deal with those who fomented terrorism, or sought to provoke others to commit terrorist acts. To that end, Mr Clarke MP intended to draw up a list of unacceptable behaviours which fell within these powers, for example, preaching, running websites or writing articles intended to foment or provoke terrorism. The list would be indicative rather than exhaustive. There would be consultation because it was important that the government worked with communities. Where there were grounds for considering that a person had been engaged in such activities, or would do so in the United Kingdom, exclusion would be considered.

40. Mr Clarke MP told the House of Commons that he had asked his officials, together with the Foreign and Commonwealth Office and the intelligence agencies, to establish a full database of individuals around the world who had demonstrated the relevant behaviours. That database would be available to entry clearance and immigration officers and would be added to the current warnings index. Entry on the index did not necessarily mean exclusion, but in all cases it would trigger the possibility of a decision to exclude by Ministers. In addition to using that list to ensure that those conducive powers were applied more widely and systematically at the point of entry, the specified unacceptable behaviours would not be permitted for individuals who had leave to enter or remain in this country. That power arose in various categories. For those in the United Kingdom temporarily, for example, as visitors, students or workers, or their dependants, and for those with indefinite leave to remain, any breach would lead to termination of their leave or deportation; asylum seekers, as a general rule, would be detained and their claims fast tracked; and with refugees, consideration would be given to whether the behaviours described fell within one of the categories for exclusion from protection under the 1951 Refugee Convention. The power of exclusion was necessarily targeted at those outside the country. When people who are already in the United Kingdom engaged in the kind of behaviour that he had identified it may well be appropriate to deport them under statutory powers.

41. The consultation Exclusion or Deportation from the UK on Non-Conducive Grounds was launched on 5 August 2005. Following it, on 24 August 2005, the Home Secretary announced a list of behaviours which would form the basis for excluding

and deporting individuals from the United Kingdom. The behaviours encompassed by the policy are as follows:

> "The List of Unacceptable Behaviours
>
> 3. The list of unacceptable behaviours is indicative rather than exhaustive. It covers any non-UK national whether in the UK or abroad who uses any means or medium including:
>
> - Writing, producing or distributing material;
> - Public speaking including preaching
> - Running a website; or
> - Using a position of responsibility such as teacher, community or youth leader
>
> To express views which:
>
> - Format, justify or glorify terrorist violence in furtherance of particular beliefs;
> - Seek to provoke others to terrorist acts;
> - Foment other serious criminal activity or seek to provoke others to serious criminal acts or;
> - Foster hatred which might lead to inter-community violence in the UK."

42. On 28 October 2008 the then Secretary of State, Rt Hon Jacqui Smith MP, made a written statement to Parliament on the unacceptable behaviours policy. She said (Hansard, column 26 WS) that she had reviewed existing policy on the exclusion from the United Kingdom of those individuals who engaged in violence or hatred in support of their ideology. The government would create a presumption in favour of exclusion in respect of all those who had engaged in the types of behaviour set out in the Home Secretary's statement of 24 August 2005. Where an individual claimed to have repudiated their previous extremist views or actions, the burden of proof was on them to demonstrate that that was so and has been publicly communicated.

Discretion to exclude – the authorities

43. There are a number of authorities relevant to the Court's approach in reviewing the decision of the Secretary of State to exclude. R (Farrakhan) v Secretary of State for the Home Department [2002] QB 1391 involved personal decisions of two Home Secretaries to exclude an American citizen, the leader of a group known as the "Nation of Islam", on public policy grounds, a power comparable to that exercised in this case but contained in the previous Immigration Rules. Farrakhan had never been permitted to enter the country. The Secretary of State accepted that the decision involved a restriction on Farrakhan's Article 10 ECHR freedom of expression rights.

The implications of that are addressed below. For present purposes, the relevance of the case is that the Court of Appeal held that it was appropriate to accord a particularly wide margin of discretion to the Secretary of State. The court identified four factors supporting this. First and foremost was the fact that an immigration decision was involved. The Strasbourg Court attached considerable weight to the right under international law of a State to control immigration into its territory. The weight that this carried was the greater because the Secretary of State was not motivated by the wish to prevent Mr Farrakhan from expressing his views, but by concern for public order within the United Kingdom: [71]. The second factor was the fact that the decision in question was the personal decision of the Secretary of State, and a decision not taken lightly, including having been made following widespread consultation: [72]. Thirdly, the Secretary of State was far better placed to reach an informed decision as to the likely consequences of admitting Mr Farrakhan than was the court: [73]. Finally, the Secretary of State was democratically accountable for the decision: [74].

44. That the test for curial intervention is very high is emphasised in cases in comparable areas. In N (Kenya) v Secretary of State for the Home Department [2004] EWCA Civ 1094; [2004] INLR 612 the appellant had committed serious crimes. He challenged the decision of the Secretary of State to deport him on the basis that it was deemed conducive to the public good within section 3(5) of the Immigration Act 1971. The appellant had a statutory right of appeal to an adjudicator, which he exercised. Under the legislation then in force the adjudicator had a power to allow the appeal if he considered the Secretary of State's discretion should have been exercised differently. The adjudicator allowed the appeal because of the low risk of re-offending and Article 8 ECHR considerations. The Asylum and Immigration Tribunal allowed the Secretary of State's appeal from the adjudicator.

45. The Court of Appeal concluded, by majority, that the Tribunal was correct. May LJ said that it was for the adjudicator, in the exercise of his discretion, to weigh all the relevant factors. However, an individual adjudicator was no better able to judge the critical public interest factor than was the court. In the first instance, that was a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view. The adjudicator's decision was unbalanced because of the focus on re-offending risk to the exclusion, or near exclusion, of weighty public interest factors: [64]. Judge LJ held that the "public good" and the "public interest" were wide-ranging but undefined concepts. Broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom were engaged. The Secretary of State had a primary responsibility for this system, his decisions having a public importance beyond the personal impact on the individual who would be directly affected by them: [84]. Sedley LJ dissented on the basis that if the adjudicator gave considerably greater weight than the Home Secretary to the risk of re-offending, that was exactly what his jurisdiction entitled him to do: [77].

46. The approach in N (Kenya) was followed in OP (Jamaica) v Secretary of State for the Home Department [2008] EWCA Civ 440. In CB (United States of America) v Entry Clearance Office (Los Angeles) [2008] EWCA Civ 1539 the Court of Appeal held that an immigration judge had made a material error of law and had failed to give adequate reasons when deciding what was conducive to the public good when

allowing an appeal by an American singer against a decision refusing him entry clearance under paragraph 320(19). Laws LJ (with whom Richards LJ agreed) observed:

> "[15] … In this particular area, unlike some other areas of immigration and asylum law, a degree of deference is due to the original decision maker. The subject matter is the good of the United Kingdom generally. That, it may be said, has strategic or overreaching elements where the Secretary of State and indeed his Entry Clearance Officers have special responsibility."

LEGITIMATE EXPECTATION

47. The breach of Dr Naik's legitimate expectations lay at the heart of his case as advanced before me. That breach was either of a continuing entitlement to visit the United Kingdom pursuant to the 2008 entry clearance, in the light of previous visits, or that the terms of any withdrawal of that entitlement would include sufficient warning, failing which transitional protection would be given, enabling Dr Naik to fulfil prior commitments. The Secretary of State contends that the claim that Dr Naik had a legitimate expectation that he would be permitted to enter the United Kingdom is unsustainable given the published policy on unacceptable behaviours and the fact that there had been no previous consideration of the question of exclusion.

The law

48. Shortly stated the law of legitimate expectation is that where a public authority has made a promise or adopted a practice which represents how it proposes to act in a given area, the courts will protect an expectation that it will be honoured unless there is good reason not to do so. Depending on the circumstances the person having the legitimate expectation may be entitled to enforce the continued enjoyment of the substance of the promise or practice, in the face of the public authority's ambition to act contrary to it: R (Bibi) v Newham London Borough Council (No 1) [2001] EWCA Civ 607, [2002] 1 WLR 237, [43]. The promise or practice must be clear, unambiguous and unqualified: R (Bancoult) v Foreign Secretary (No 2) [2008] UKHL 61, [2009] 1 AC 453, [60]. In principle a course of conduct can be enough to give rise to a legitimate expectation if it would be an abuse of power for the public authority suddenly to change it: see R v Inland Revenue Commissioners ex parte Unilever [1996] STC 681.

49. In R v North and East Devon Health Authority ex p Coughlan [2001] QB 213 the Court of Appeal said that where a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power. In such cases the court decides what the correct balance is between the interests of a person with a legitimate expectation and the interests that weigh against fulfilling it: [57]. On one side of the balance in the proportionality assessment are factors such as the character of the promise or practice, whether it is made to an individual or specific group, and the extent to which there has been reliance on it. On the other side is the extent to which, for instance, honouring the expectation touches on issues of high policy or has

implications for public policy affecting broad and fundamental community interests: R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, [69].

Dr Naik's case

50. On Dr Naik's behalf, Mr Husain QC submits that the basis of the legitimate expectation Dr Naik had is fourfold. First, he had been granted six entry clearances for the United Kingdom in 1990, 1992, 1996, 2001, 2006 and 2008. The sixth was valid for five years and under it Dr Naik was entitled to enter on an unlimited number of occasions during its validity. Secondly, Dr Naik had visited the United Kingdom on 15 occasions under these entry clearances. On 5 occasions that was for personal and private visits, during which he would sometimes give impromptu talks if asked. On 10 occasions it was for lecture tours. Thirdly, there had been ample opportunity for appropriate consideration to be given to the question of Dr Naik's acceptability on conducive grounds and for the exercise of the various powers to prevent entry or to exclude. After all, Dr Naik is a Muslim orator with a very substantial profile and on his various visits he has addressed large, public audiences. During 2006 there was the controversy in Cardiff, with publicity being given to a call for Dr Naik to be prevented from speaking, with attention drawn in the Western Mail to certain of his views. Fourthly, and closely related to this third point, is that prior to the present decisions Dr Naik has never been informed by the authorities that he would not be permitted to speak in the United Kingdom, or that he had said or done anything either in or outside the country which would bar him on conducive grounds.

51. Accordingly, it is said on Dr Naik's behalf, he had a substantive legitimate expectation that the authorities did not think that he was unsuitable for admission to this country, including under the non-conducive criterion. He had reasonably relied on his expectation that his entry to this country, including for the purposes of lectures, was acceptable. He was entitled to conduct his affairs on the basis that nothing he had said or done, prior to the grant of his visa in June 2008, and his subsequent entries in July-August 2008 and July 2009, constituted a bar to his continued entry, or suggested that his presence was not conducive to the public good. Dr Naik had a substantive legitimate expectation that he would be able to continue to enjoy the benefit of the entry clearance conferred on him in June 2008. In other words, he would be able to visit the United Kingdom, as previously, unless and until notified of a rationally determined, significant change of circumstances. There was nothing in the way of this, since all the statements eventually invoked against him predated the issue of the 2008 visa, and his later visit in July 2009.

52. In Mr Husain QC's submissions the 17 June 2010 and 25 June 2010 decision letters from the Secretary of State did not acknowledge the existence of any such expectation. The 9 August decision letter stated, first, that no expectation could arise and secondly, that, even if it did, there could be no legitimate expectation that a future Secretary of State might not take a different view. Thus the Secretary of State's letter erroneously foreclosed the possibility that such an expectation may require her view to yield to it and also failed to grapple with the fairness of reversing Dr Naik's entitlement to enter. It is very difficult to see what weight the Secretary of State could have attached to Dr Naik's expectations based on his entry clearance and visits, since she only acknowledged the existence of a part of his immigration history, omitting to mention some entry clearances and, indeed, his visits. Moreover, the decision letter

of 9 August did not attempt to spell out any primary case as to why a fresh assessment of the past statements in the context of 2010 would justify a different conclusion to the assessment, notional or real, at the time in June 2008 of the last entry clearance or of the 2009 visit.

No substantive legitimate expectation

53. In my view Dr Naik's case on legitimate expectation falls at the first hurdle. While in principle a course of conduct can base a legitimate expectation, the circumstances here negate its existence. Certainly there is the course of conduct of the Secretary of State over a number of years in issuing him visas and enabling him to enter the country so he could conduct lecture tours and business associated with his foundation and media interests. But that could not have led Dr Naik to have a legitimate expectation that the Secretary of State had addressed the issue of his public statements and concluded that he was suitable to be in the United Kingdom. That is because, as a matter of law, nothing in the legislation or the Immigration Rules requires the Secretary of State to consider whether to exclude a person from the United Kingdom before entry clearance is decided. The grant of a visa does not require, as a condition precedent, substantive consideration of exclusion. The power of the Secretary of State personally to exclude under paragraph 320(6) of the Immigration Rules is legally distinct from the other non-conducive powers and the powers to curtail leave and to deport. Nothing done at any stage by any entry clearance or immigration officer precluded the Secretary of State from making a personal exclusion decision once she considered the matter.

54. As a matter of fact prior to 2010 no consideration was given by any entry clearance or immigration officer to Dr Naik's statements. Dr Naik's visas were granted without substantive consideration of the question of exclusion. No Secretary of State had previously considered the question whether Dr Naik should be excluded from the United Kingdom. The Secretary of State had not said or done anything to justify the assumption that she had thought about whether Dr Naik was unsuitable to be in the United Kingdom. That publicity has been given to the 2006 August visit is an insufficient basis for a legitimate expectation that the Secretary of State had considered Dr Naik's case. It would have been different if Dr Naik had been given some explicit assurance that his case had been considered by the Secretary of State and a decision reached that he should not be excluded.

55. In any event, even if the Secretary of State's course of conduct had induced a substantive expectation on Dr Naik's part, and for her to frustrate it would amount to an abuse of power, the correct balance in my view comes down in favour of the Secretary of State's entitlement to do precisely that. There is no doubt that, on one side of the balance, the benefit conferred on Dr Naik by entry was of importance. He was able to give his public lectures and be seen by the audience and interact with them. No doubt, and not to be downplayed, he was also able to oversee his charitable and broadcast interests. Any expectation as a result of the Secretary of State's course of conduct was shared among a limited class, limited to himself and, at most, his immediate entourage, and was thus endowed with the pressing and focused characteristic common to such expectations.

56. But on the other, and in my view, weightier side of the balance was the power of the Secretary of State to decide that a non-national such as Dr Naik should be excluded

for the public good. That power had been given specific content in 2005 in the unacceptable behaviours policy which followed the 7/7 attacks in London. Indeed in 2008 the then Secretary of State had publicly announced that there would be a presumption for the future that those who had made statements within the ambit of the policy would be excluded. In my view the current Secretary of State was entitled to make a personal assessment in 2010 of whether, in her view, exclusion was conducive to the public good, given that background and drawing on the range of sources and advice available to her. She had to account for the exercise of that power, in the first instance to the House of Commons, which she did through Baroness Neville-Jones' letter to MPs on 17 June. Given all that, Dr Naik's case that he had a substantive legitimate expectation is not sustainable.

Procedural legitimate expectation

57. So far my focus has been on Dr Naik's substantive legitimate expectation. As an alternative it was submitted on Dr Naik's behalf that he had an expectation that, if there were to be a change in his entitlement to enter, it would be effected fairly. Fairness required that he would be given sufficient prior warning as to enable him to arrange his affairs accordingly, or sufficient information concerning the decision to enable him to challenge it prior to the stage that it operated to his prejudice. Failing such provision, fairness required that he be given transitional protection against the change, as suggested by Inayat Bunglawala and requested by his solicitors on 23 June 2010. The change was significant given the public engagements at three large venues, arranged at considerable cost to himself and his partners. The Home Office was aware of the trip and its purpose.

58. In my view Dr Naik had no right to transitional protection. It will be recalled that in his solicitor's letter of 23 June 2010 that took the form of a suggestion that the exclusion be reconsidered for the short term so that he could fulfil the engagements planned for later that month. Transitional provision of this character would have been contrary to the whole purpose of the exclusion. The specific reason for excluding Dr Naik was to prevent his trip and the three large public events from taking place. There is more substance, however, in the submissions that the Secretary of State did not give Dr Naik sufficiently early notice that she was minded to revoke his entry clearance. That issue is better addressed under the head of procedural fairness, to which I now turn.

PROCEDURAL UNFAIRNESS

59. A second ground of attack on the Secretary of State's decision is that there was procedural unfairness in that Dr Naik was not afforded the opportunity to be heard on all matters held against him in the decisions. The withdrawal of a 5 year multiple-entry visa was a substantial detriment and he was entitled to significant procedural protection. The Secretary of State replies that there has been no unfairness. Dr Naik did have an opportunity to make representations before the initial decision was made. In as much as he was not given a greater opportunity that was because the decision could have been thwarted and there was significant time pressure. Once the initial decision was made he had an opportunity to, and did, make extensive representations which were fully taken into account by the Secretary of State before making the decision to confirm the exclusion.

The law

60. It is horn book law that a person may be entitled to an opportunity to make meaningful representations to a public authority about a decision. Generally speaking that opportunity must be afforded before the public authority makes the decision adversely affecting the person's rights, since once a decision is made views become entrenched: R v Home Secretary ex p Hickey (No 2) [1995] 1 WLR 734, 744B. The nature of the opportunity is influenced by the nature of the right: R v Secretary of State ex p Doody [1994] 1 AC 531, 560D-G. R v Secretary of State for the Home Department ex parte Fayed [1998] 1 WLR 763 is illustrative. The Court of Appeal there was considering the correct approach to the good character requirement in an application for naturalisation as a British citizen under the British Nationality Act 1981. It held that, before reaching a negative decision, it was incumbent on the Secretary of State to inform the applicant of the nature of his concerns and afford him the opportunity of addressing them: see [77] H, 789 E-F.

61. In the exclusion context some indication of the appropriate type of procedural protection is shown by past practice. In R (Farrakhan) v Secretary of State for the Home Department [2002] QB 139 the then Home Secretary directed Farrakhan's exclusion from the UK in 1986. In 1997, the Home Secretary undertook a personal review. In July 1998, a 'minded to maintain the exclusion' letter was issued to Farrakhan's solicitors, giving reasons and inviting further representations before a final decision was taken. A decision was reached in July 1999, after which correspondence continued. The decision letter was dated November 2000. In R v Secretary of State for the Home Department ex parte Moon [1997] INLR 165, an adjudicator had allowed an appeal against a refusal to allow Moon's entry. Following the appeal to the adjudicator in 1991/1992 letters of consent were issued to Moon. However, in 1995, he was refused entry on the basis that his presence in the country was not conducive to the public good. The decision was quashed due to a lack of procedural fairness, because there had been a failure to explain what had changed since the letters of consent had been granted. There was no reason not to inform Moon of the proposed decision to exclude, and the reasons for it, a week before he was due to travel. Following this the Home Department undertook a review of the decision and invited more representations: see Moon v Entry Clearance Officer, Seoul: [2005] UKIAT 00112; [2006] INLR 153, [4]-[6]. In 2001, the Home Department issued a minded to refuse letter to Moon, on the basis that his presence was not conducive. The ultimate decision was taken in May 2003.

62. Finally, in Murungaru v Secretary of State for the Home Department [2006] EWHC 2416 (Admin); [2008] EWCA Civ 1015 a Kenyan government minister sought to challenge the revocation of his multiple-entry visa that had been made without notice or reasons. At first instance Keith J emphasised that the duty to give an opportunity to make representations applied to decisions to exclude persons from the United Kingdom. Fairness would very often require the decision maker to take all necessary and reasonable steps to enable the affected person to make effective representations against the proposed decision. This might include the issuing of a minded to refuse letter: [19]-[21]. While the Court of Appeal pursued different aspects of the case it broadly accepted the approach of Keith J on procedural fairness.

The 16 June decision

63. The Secretary of State concedes that there were limitations on Dr Naik's opportunity to make representations before the initial decision was made. Thus Dr Naik was not aware of all the material that was ultimately taken into account. Although he was aware of the gist of the concerns about him, he did not have an opportunity to deal with every piece of information ultimately brought to bear. The limitations, continues Mr Eady QC for the Secretary of State, are explained by two factors. First, there was a tight time frame. Dr Naik was due to travel to the United Kingdom on 18 June 2010. Research was being undertaken up until the date of the Secretary of State's decision on 16 June 2010. Secondly, if Dr Naik had been given extensive notice of the intention to consider the question of exclusion, or if the decision on exclusion had been delayed for a significant period of time to allow full representations to be made, he could simply have come to the United Kingdom before the exclusion order had been made. If a decision had not been made on 18 June 2010, the risk that Dr Naik would travel was very much greater; the Secretary of State could have had no assurance that he would not have travelled and foregone his speaking engagements merely because of the risk that entry might be refused or his leave curtailed.

64. Not without some hesitation I have concluded that the Secretary of State's decision of 16 June was flawed for a lack of procedural fairness. At the outset it must be acknowledged that the authorities cited do not in any way lay down tram tracks to be followed in these cases. In Murungaru, for example, the visa was withdrawn without advance notification: [2006] EWHC 2416 (Admin), [3]. The issue before the court was not whether advance notification because of urgency would have enabled the claimant to thwart the decision making process, but whether the court should dismiss the fairness based challenge without first considering what were the Secretary of State's confidential reasons for exclusion.

65. Further, there is no doubt that Dr Naik was given an opportunity to make representations before the decision was made. He was aware that consideration was being given to exclusion. He was also aware that the basis on which that consideration was being given was public statements he had made. Further, the legal and policy framework governing the decision making process was readily accessible, in particular the Immigration Rules and the unacceptable behaviours policy. As mentioned earlier there was the meeting between Dr Naik's representations and Home Office officials on 3 June and subsequent discussions, although there is a factual dispute about the details. Dr Naik sent documents dated 5 June and 14 June explaining his position on matters such as terrorism and refuting the allegations made in the newspapers.

66. In my view, however, the context of the Secretary of State's consideration was that Dr Naik had an important entitlement – a five year multi-entry business visit visa enabling him to pursue his interests both as a leading Muslim writer and public speaker, and as someone with important charitable and business interests here. This meant that the duty to act fairly in his case was given added force. He needed to know what was being taken against him so he could address the concerns. Although not a legal requirement, a "minded to exclude" letter would have assisted. The importance through procedural protection was heightened by the fact that the exclusion decision would not enjoy the right of appeal.

67. Instead, in the UK Border Agency letter of 17 June, recording the Secretary of State's decision, three of the four statements specifically referred to as the basis of the

decision had not been put to Dr Naik. The four statements in the letter were statements 1-3 and 5 above. Statement 2 was firmly on the agenda from the Sunday Times article, although incorrectly dated as 2006, whereas it pre-dated the events of 9/11. On one interpretation statement 1 was also referred to in the Sunday Times piece. Dr Naik addressed the issues in both statements in his 3 June submission. But neither statement 3 nor 5 was opened up to Dr Naik. Statement 5 was of particular importance, about the relationship between Muslims and Jews, since it was pertinent to the "fostering hatred" prong to the Secretary of State's decision, as recorded in the 17 June UK Border Agency letter. While in his representations there had been some mention of interfaith dialogue, their focus had been what in the decision letter of 17 June was the "justifying terrorism" prong of the Secretary of State's decision.

68. The justifications for the limitations in Dr Naik's opportunity to meet the case against him – the tight time frame and the potential for him to thwart a exclusion decision – are unpersuasive. Home Office officials began research on Dr Naik's profile on 26 May 2009. Since his name had been added to the Mumbai local alert list in December 2008 it would seem that the officials need not have started with a blank sheet. Moreover, Dr Naik's prominence should have made the task of inquiry relatively straightforward. In my view it should have been possible to construct any case against Dr Naik well before the decision date of 16 June and to have put that to him. As to the contention that Dr Naik could have circumvented a decision to exclude hm by travelling immediately that overlooks, in my view, that if he had wished to frustrate the Home Secretary's consideration of exclusion he would surely have done so when he became aware of the question of the review of his position after the Sunday Times article, and well before the Home Secretary had taken the decision, at any time between early June and 17 June. The justification also overlooks the fact that Dr Naik was very unlikely to travel to the United Kingdom in the knowledge that he could have been refused entry, or have his leave curtailed shortly after his arrival. It would not have been a sensible course for anyone in his position to have adopted.

9 August decision

69. If the 16 June decision was flawed for lack of procedural fairness, so too was that recorded in the 25 June letter, which was perfunctory in its confirmation of the earlier decision. By contrast the 9 August letter, maintaining the earlier discussion, reflected a mature consideration of Dr Naik's case. It followed the further representations made on Dr Naik's behalf, primarily in his solicitor's letter of 23 June and in the letter before claim dated 12 July 2010. As summarised earlier it addressed the representations Dr Naik had made. It acknowledged that he had made statements condemning terrorist violence. However, there were statements which fell within the unacceptable behaviours policy and thus, having considered the matter with an open mind, the Secretary State maintained her decision to exclude.

70. That does not mean the 9 August letter was perfect. There were statements in it not raised with Dr Naik as those he needed to address. The 9 August letter also relied on four reports of persons involved in extremist activity, having shown an interest in him and his organisation, again matters not previously relied on, although they had been touched on in the Sunday Times article. In addition the letter drifted to an extent outside the unacceptable behaviours policy with the accusation of divisiveness. On the whole, however, Dr Naik had had the opportunity to make representations on the thrust of the Secretary of State's concerns. The 9 August letter was a relatively full

response to them. Notwithstanding that a decision to exclude had already been made, in my view the decision recorded in the letter was not flawed by procedural unfairness.

FREEDOM OF EXPRESSION

71. It is said on Dr Naik's behalf that the decision to exclude him and to revoke his visa were in violation of the right to freedom of expression pursuant to article 10 of the European Convention of Human Rights and thus unlawful under the Human Rights Act 1998 ("the 1998 Act"). The interference with the right is neither justified nor proportionate. For the Secretary of State it is said that Dr Naik is not entitled to rely on article 10 because he is not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention and is thus not entitled to rely upon the Convention rights scheduled to the 1998 Act. In any event his exclusion is necessary for, and proportionate to, the legitimate aims of protecting national security, preventing crime and protecting the rights of others.

Is Article 10 engaged?

72. The territorial jurisdiction of the 1998 Act and the European Convention on Human Rights, subject to certain narrow exceptions which do not apply here, is firmly established in authority binding me: R(Al-Skeini) v Secretary of State for Defence [2008] 1 AC 153; R (Smith) v Oxfordshire Assistant Deputy Coroner [2010] UKSC 29; [2010] 3 WLR 223; [2010] 3 All ER 1067. Al-Skeini is currently before the Grand Chamber of the Strasbourg Court and a different approach may produce changes in the domestic jurisprudence. Until that happens, this court must follow those two decisions in so far as they apply in the circumstances of this case.

73. Al-Skeini recognised that acts performed by United Kingdom public authorities outside the territory of the United Kingdom could, in exceptional circumstances, constitute an exercise of their jurisdiction within the meaning of article 1 of the Convention. Article 1 provides that Convention states must extend to everyone within their jurisdiction the rights and freedoms it provides. But the court underlined that article 1 reflected a territorial concept of jurisdiction, and that other bases of jurisdiction were exceptional and required special justification. In the course of his speech, Lord Brown expressed the view that the court ought not to construe article 1 as reaching any further than the existing Strasbourg jurisprudence clearly showed: [107]. The watershed decision in Strasbourg was Bankovic v Belgium [2001] 11 BHRC 435, the central propositions of which Lord Brown then set out: at [109].

74. Later, in R (Smith) v Oxfordshire Assistant Deputy Coroner, Lord Phillips PSC held that the Strasbourg jurisprudence did not support any general principle that there will be jurisdiction under article 1 of the Convention whenever a state exercises authority, be it legislative, judicial or executive, which affects a Convention right of a person, whether that person is within the territory of that state or not. In any event, if there was such a principle so far as the exercise of executive authority was concerned, one could postulate that it required effective control, either of territory or of individuals, before article 1 jurisdiction could be established. Lord Phillips continued that the Grand Chamber in Bankovic v Belgium had approved the proposition that article 1 jurisdiction is essentially territorial in nature and that other bases of jurisdiction are exceptional and require special justification in the particular circumstances of each

case: [47]. Lord Brown's speech in Al-Skeini at [107] was followed: [60]. Lord Phillips' approach was endorsed by the majority in the Supreme Court. In particular there was a scholarly analysis of the authorities and literature by Lord Collins, which was approved by the other justices: see esp [305].

75. In the course of his judgment, Lord Phillips referred to the Strasbourg jurisprudence which holds that those affected by the conduct of a state's diplomatic and consular officials abroad can fall within the jurisdiction of the state. Reference was specifically made on Dr Naik's behalf to WM v Denmark [1992] 73 DR 193, a decision by the European Commission on Human Rights, which applied the test of whether the acts of the Danish Ambassador constituted an exercise of authority over a person seeking shelter in the Danish Embassy in the former East Germany, to an extent sufficient to bring the person within the jurisdiction of the Danish authorities. WM was cited by Lord Collins in the course of his judgment in R(Smith), along with many other authorities: at [250]. In my view the facts of WM are far removed from those in this case. Moreover, it is made clear from the majority judgment in R(Smith) that any approach must be that article 1 reflects the territorial nature of jurisdiction and that other bases are exceptional. There is no support in the exceptions recognised in the Strasbourg or domestic authorities that somehow Dr Naik can benefit from article 10 rights because of the revocation of his visa by the Deputy British High Commission in Mumbai.

76. On Dr Naik's behalf Mr Husain QC also invoked Farrakhan [2002] QB 1391. For Farrakhan it was said that article 10 was engaged and that the Secretary of State was obliged to take that properly into account. At first instance the Secretary of State had conceded that the facts of the case engaged article 10. The Court of Appeal gave advance warning to counsel that it wished to hear submissions as to why this was so. It 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. It was a remarkable fact that almost all the articles of the Convention which permit, for specified purposes, restrictions on the freedoms that they contained did not include in those purposes the exercise of control of immigration. This strongly suggested to the Court of Appeal 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.

77. Giving the judgment of the Court of Appeal, Lord Phillips MR then recorded that, for the purposes of the case, the Secretary of State was prepared to accept the fact that an individual who 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. The court had proceeded on the basis of that concession without examining whether or not it is correctly made: [34]. The court then examined a number of article 10 cases from Strasbourg. For example, Piermont v France (1995) 20 EHRR 301 involved an application by a German member of the European Parliament, who was expelled from French Polynesia at a time when an election campaign was in progress. She was then excluded from entry to New Caledonia for reasons that included the authorities' belief that her presence during an election campaign there was likely to cause public disorder. When she arrived she was held at the airport. With the decisions in both French Polynesia and New Caledonia the Strasbourg Court held that Article 10 was

engaged. On the basis of these Strasbourg cases the Court of Appeal in Farrakhan said that 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 would be directly engaged: [55].

78. In my view the passage at [55] in Farrakhan cannot be used to support Dr Naik's case. First, as Mr Husain QC on his behalf conceded, it is not binding on me. A court is not bound by a proposition of law which, although part of the ratio decidendi of an earlier decision, the earlier court simply assumed to be correct without argument or consideration. If any authority is required for that it is contained in the judgment of Buxton LJ for the Court of Appeal in R (Kadhim) v Brent LBC House Benefit Review Board [2001] QB 955. Secondly, the Strasbourg article 10 cases referred to in Farrakhan such as Piermont v France all involved expulsions or deportations, in other words, the person claiming freedom of expression rights was in the jurisdiction and not applying from outside. Finally, Farrakhan has to read in the light of the House of Lords and Supreme Court authorities, Al Skeini and Smith respectively.

79. Thus I return to the issue of the application of R (Al Skeini) and R (Smith) to the circumstances in the present case. In my view the territorial principle they establish means that Dr Naik is unable directly to assert article 10 rights, even in respect of rights to be exercised within the jurisdiction. However, article 10 contains an express right for others to receive the information. The imparting and receipt of information are two sides of one coin. In my view the rights to impart and receive in this context must be viewed in the same integral way in which the court must approach article 8 rights: R Beoku-Betts v Secretary of State for Home Department: [2008] UKHL 390 [2009] 1 AC 115. That is especially so in this case where it is apparent that Dr Naik's question and answer sessions are significant to his public lectures. It is the ability to directly see, hear and interact that is a feature of Dr Naik's attraction. Those who would have attended Dr Naik's events, or at least a surrogate in the form of the Islamic Dawah Centre, would have participated in the hearing before me, but for the procedural reasons indicated above. Sales J assumed that Dr Naik would be able to advance the grounds adequately without the Centre being present. That being the case it seems to me that I should treat Dr Naik as asserting their rights, and for that reason article 10 is engaged since they are clearly within the jurisdiction.

Interference with freedom of expression justified

80. That leads to the question whether, if article 10 is engaged, could the interference with it through Dr Naik's exclusion from the United Kingdom be upheld in accordance with article 10(2). Mr Husain QC said not, first, because it was arbitrary, since it constituted the sudden revocation of a long-term entitlement to enter the United Kingdom, on the basis of conduct prior to the conferral of that right. The statements were made by Dr Naik between 1997 and 2007, and the visa granted in 2008. There was no predictable legal basis by which to distinguish between circumstances where the right had been given to Dr Naik through the 2008 visa and circumstances where, pursuant to the same conduct, entry clearance was withdrawn in 2010. How could the requirements of foreseeability and clarity exist if historical statements, which did not justify exclusion in 2008, suddenly became sufficient to do so in 2010 without any material change in the legal context. Further, Mr Husain QC submitted, the interference with article 10 rights could not be said to be proportionate. The

curtailment of freedom of expression was not convincingly established by compelling countervailing considerations. In this regard, and also to demonstrate that Dr Naik's statements could not be said to fall within the unacceptable behaviour policy, even in its expanded form in the 9 August letter, Mr Husain QC led me through Dr Naik's detailed second witness statement, which elaborates the points made elsewhere, and which I have summarised earlier in the judgment, as well as seeking to rebut the Secretary of State's reliance on a number of new matters. The statement contains detailed cross-references to transcripts of Dr Naik's talks and question and answer sessions.

81. In my view interference with article 10 rights in Dr Naik's case can be justified within article 10(2). First, the interference through Dr Naik's exclusion is in accordance with law in that it is governed by paragraph 320(6) of the Immigration Rules and the published unacceptable behaviours policy. They provide a predictable legal basis for the exercise of the power. That Dr Naik was given the right to enter the United Kingdom in 2008 was not based on the statements that subsequently resulted in his exclusion. Those statements were not taken into account and there was no consideration of exclusion in 2008.

82. Moreover, Dr Naik is not prevented from making or distributing his views through, for example, Peace TV. Those interested can obtain easy access to them through his broadcasts or the recordings of his public lectures. The limitation is that he cannot appear at public events in this country. The interaction with the audience in his public lectures is an important aspect in the expression of Dr Naik's views. Those in this country will have to experience that second-hand, through watching it take place elsewhere. While not slight, that interference with freedom of expression is in my judgment not of major account.

83. In his second statement Dr Naik condemns terrorism and seeks to explain the eleven statements which the Secretary of State has identified as objectionable by placing them in context. Nonetheless, it seems to me that the Secretary of State is entitled to conclude that Dr Naik's explanations unjustifiably marginalise the importance of some of the statements, use semantic arguments to avoid the import of others, and fail to grapple with the substance of others. Given the importance attached to the particular legitimate aims that are being pursued, and the nature of the impact as I have characterised it, it seems to me that the interference with freedom of expression by the Secretary of State's exclusion decision is proportionate to these aims.

INSUFFICIENT REASONS, RELEVANT CONSIDERATIONS AND UNREASONABLENESS

84. Dr Naik's fourth ground of challenge to the decisions is that they were based on flawed and insufficient reasoning, were taken without regard to relevant considerations and were irrational in the public law sense.

85. Thus it is said that the reasons in the various letters written on behalf of the Secretary of State did not explain what, if any weight, was given to the fact that Dr Naik had been given entry clearance until 2013, had a long record of visiting the United Kingdom, and had taken actions to his detriment, including planning a major trip pursuant to the visa which had been granted to him. There was no detail on what, if anything, it was about Dr Naik's conduct since the 2008 grant of entry clearance, or

since his admission in 2008 and 2009, that now rendered his presence not conducive. What, if anything, was it about his likely conduct on his proposed trip in June 2010 which meant that his presence here was not conducive? And why, if at all, could limited permission for him to enter on suitable conditions and without prejudice to any future assessments, not be granted?

86. In as much as the reasons in the 17 June letter were inadequate, that is reflected in my finding on procedural fairness. That letter was deficient because Dr Naik had not been in a position before the decision on 16 June to meet the case advanced against him. The 9 August letter gave sufficient reasons for the decision to exclude Dr Naik. There was no obligation to set out explicitly how much weight was given to the various factors on which the Secretary of State relied, and there was no obligation to provide the level of detail Mr Husain QC suggests.

87. While still advanced the relevant considerations submission was not pressed orally before me. That is not surprising. Considerations such as Dr Naik's previous visits to the United Kingdom could be regarded by the Secretary of State as of marginal, if any, relevance to the question of whether exclusion was conducive to the public good, particularly, as explained above, Dr Naik had not previously been considered for exclusion. The Secretary of State's focus could properly be on the statements which engaged the policy on excluding individuals who fell within the unacceptable behaviours set out.

88. The irrationality challenge to the Secretary of State's decision is hopeless. As the authorities make clear the threshold for intervention in this area is very high. The decision was made by the Secretary of State personally. She is in the best position to make the appropriate assessment. It was not irrational for her to conclude that Dr Naik's statements are such that his exclusion would be conducive to the public good and that his explanations in his various representations were not sufficient to rule out the application of the unacceptable behaviours policy.

CONCLUSION

89. In my judgment Dr Naik was not accorded the procedural fairness to which he was entitled prior to the Secretary of State's decision on 16 June. The decision letter of 17 June reflects that, in that it focuses on the application of the unacceptable behaviours policy to four statements, only one of which was plainly before Dr Naik so that he could address the concern surrounding it and point out, for example, that it pre-dated the events of 9/11. By the time of the further decision of 9 August, however, Dr Naik had had a substantial opportunity to make representations about the basis on which the Secretary of State affirmed his exclusion. That 9 August decision thus survives the procedural fairness challenge. In my view it also survives the other challenges advanced against it, for the reasons I have explained. Dr Naik could not have had a substantive legitimate expectation that he would be permitted to continue to visit this country, and any interference with the article 10 rights of Dr Naik and his potential audience is lawful and proportionate. The result is that the Secretary of State's exclusion of Dr Naik from the United Kingdom is lawful.