Neutral Citation Number: [2008] EWCA Civ 443

Case No: 2007/9516

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
APPLICATION FOR PERMISSION TO APPEAL FROM
THE PROSCRIBED ORGANISATIONS APPEALS COMMISSION
AND IN THE MATTER OF THE PEOPLE'S MOJAHADEEN
ORGANISATION OF IRAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2008

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RIGHT HONOURABLE LORD JUSTICE LAWS
and
THE RIGHT HONOURABLE LADY JUSTICE ARDEN

- -

Between :

The Secretary of State for the Home Department	**Applicant**
- and -	
Lord Alton of Liverpool and Others.	**Respondent**

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Jonathan Swift, Gemma White and Oliver Sanders (instructed by **Treasury Solicitor**) for the **Applicant**
Nigel Pleming QC, Mark Muller QC and Edward Grieves (instructed by **Bindman & Partners**) for the **Respondent**
Special Advocates: Andrew Nicol QC and Martin Chamberlain

Hearing dates : 18th, 19th and 20th February 2008

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JUDGMENT

Lord Phillips of Worth Matravers

This is the judgment of the Court.

Introduction

1. On 29 March 2001 the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 ('the 2001 Order') came into force. This added an organisation then described as the Mujaheddin-e-Khalq, but known in these proceedings as the People's Mojahadeen Organisation of Iran ('PMOI'), to the list of proscribed organisations in Schedule 2 of the Terrorism Act 2000 ('TA 2000').

2. Pursuant to section 4(1) TA 2000, PMOI made applications to be removed from the list on 5 June 2001 and 13 March 2003. Both applications were refused by the Secretary of State for the Home Department ('the applicant'). A third application was then made by the respondents, who are thirty five members of the two Houses of Parliament, on 13 June 2006. Their application was also refused by the Secretary of State on 1 September 2006.

3. The respondents appealed against this refusal to the Proscribed Organisations Appeals Commission ('POAC'). POAC allowed their appeal on 30 November 2007, determining that PMOI was not an organisation which 'is concerned in terrorism' for the purposes of section 3 TA 2000.

4. POAC refused an application for permission to appeal and the Secretary of State renewed the application before us. We invited Mr Jonathan Swift, who appeared for her, to support her application by fully developing the grounds of appeal that he sought to advance, so that we could deal simultaneously with the application and, if we granted the application, with the appeal.

5. This appeal relates to POAC's review of the decision taken by the Secretary of State. That decision was not taken by the applicant herself, but by or on behalf of her male predecessor in office. We shall for simplicity refer to the applicant and to her predecessors, including the decision taker, indivisibly as 'she'.

The statutory provisions

6. The relevant sections of the TA 2000 provide as follows:

> "**1. Terrorism: interpretation**
>
> (1) In this Act "terrorism" means the use or threat of action where - -
>
> (a) The action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it - -

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

3. Proscription

(1) For the purposes of this Act an organisation is proscribed if-

(a) it is listed in Shedule 2, or

(b) it operates under the same name as an organisation listed in that Schedule.

(2) Subsection (1) (b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.

(3) The Secretary of State may by order-

(a) add an organisation to Schedule 2;

(b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it –

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise concerned in terrorism.

4. Deproscription: application.

(1) An application may be made to the Secretary of State for an order under section 3(3) or (8)-

(a) removing an organisation from Schedule 2, or

(b) providing a name to cease to be treated as a name for an organisation listed in that Schedule.

(2) An application may be made by-

(a) the organisation, or

(b) any person affected by the organisation's proscription or by the treatment of the name as a name for the organisation.

(3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.

(4) The regulations shall, in particular –

(a) require the Secretary of State to determine an application within a specified period of time, and

(b) require an application to state the grounds on which it is made.

5. Deproscription: appeal.

(1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.

(2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.

(3) The Commission shall allow an appeal against a refusal to deproscribe an organisation or to provide for a name to cease to be treated as a name for an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

(4) Where the Commission allows an appeal under this section, it may make an order under this subsection.

(5) Where an order is made under subsection (4) in respect of an appeal against a refusal to deproscribe an organisation, the Secretary of State shall as soon as is reasonably practicable-

(a) lay before Parliament, in accordance with section 123(4) the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or

(b) make an order removing the organisation from the list in Schedule 2 in pursuance of section 123(5).

6. Further appeal

A party to an appeal under section 5 which the Proscribed Organisations Appeal Commission has determined may bring a further appeal on a question of law to

(a) The Court of Appeal, if the first appeal was heard in England and Wales"

PMOI

7. PMOI is an Iranian political organisation founded in 1965. It is a member of the National Council of Resistance of Iran ('NCRI'), which is not proscribed in the UK. Its initial purpose was to oppose the government of the Shah of Iran. Its present stated purpose is the replacement of the theocracy which succeeded that government with a democratically elected secular government in Iran.

8. Following the overthrow of the Shah in 1979 PMOI came into conflict with the government led by the Ayatollah Khomeini. PMOI members went into exile, initially in France and, from 1986, in Iraq, which was by then at war with Iran. There they were principally located in Camp Ashraf, where they maintained an armed force, the National Liberation Army. PMOI lent military support to their hosts during that war, and thereafter continued to carry out and claim credit for numerous attacks against Iranian targets.

9. The respondents claim that in June 2001, at an Extraordinary Congress in Iraq, PMOI decided to put an end to its military activities. It has since pursued a campaign to legitimise its status as a peaceful democratic movement and has attracted support in this aim from the respondents. PMOI remained armed until the invasion of Iraq by coalition forces in March 2003. At that date Camp Ashraf was surrounded and a large arsenal of weapons was surrendered by agreement.

10. PMOI has since May 2002 been on the European Union list of terrorist organisations subject to an EU-wide assets freeze. It has also been designated by the US government as a Foreign Terrorist Organisation.

11. The Iranian government remains hostile to PMOI. In August 2002 the NCRI publicised detailed allegations of Iran's programme for the acquisition of nuclear weapons.

Proscription of PMOI

12. In her covering letter to Parliament with the draft 2001 Order the Home Secretary set out the criteria applied in her decision to seek proscription of PMOI as an organisation she believed was 'concerned in terrorism'. While acknowledging that PMOI did not pose a specific threat to the UK, or to British nationals overseas, or have a presence in the UK, she had based her

decision on the nature and scale of the PMOI's activities and the need to support other members of the international community in the global fight against terrorism.

13. The first application to deproscribe PMOI was made on 4 June 2001 and rejected by the applicant on 31 August 2001. The decision was the subject of an application for judicial review. That application was refused by Richards J on 17 April 2002 on the basis that the appropriate venue for determining the issue was POAC. An appeal was then made to POAC and was due to be heard in June 2003. On 13 March 2003 PMOI made a second application for deproscription, which relied in addition on the surrender of arms to the coalition forces in Iraq. This application was refused on 11 June 2003. In the same month the appeal to POAC was withdrawn. The respondents assert that the withdrawal was a protest following the bombing of Camp Ashraf by Coalition forces in the invasion of Iraq.

The application for deproscription

14. The application with which this appeal is concerned was made by the respondents on 13 June 2006. The respondents claimed to be persons 'affected by' PMOI's proscription for the purposes of section 4(2)(b) of TA 2000 in that they were unable to support the aims of PMOI without committing criminal offences under sections 12 and 15 of the Act. Their application stated at the outset:

> "Although other arguments will be developed in this document, the Application is based principally on the fact that, whatever the position on 29 March 2001 when the PMOI was proscribed, following substantial and significant changes in the circumstances of the PMOI since the organisation's proscription, it cannot be regarded as an organisation which is concerned in terrorism within the meaning of section 3(5) of the Act. These changes result partly in unilateral decisions of the PMOI and are partly the consequence of international developments."

15. The respondents accepted that PMOI had engaged in military activity against the Iranian regime prior to June 2001, as the only means available to them to oppose tyranny and oppression. They contended, however, that since then it had conducted no military activity. It had dissolved all its operational units inside Iran. Successive Secretary Generals had renounced terrorism in public addresses. It had played no part in the second Gulf War and had co-operated with the Coalition forces. Their contention that the PMOI was not an organisation concerned in terrorism was supported by a substantial body of legal opinion. The PMOI's democratic credentials had attracted the support of Parliamentarians the world over.

16. The application did not merely rely on the cessation by PMOI of military activity since the middle of 2001. It averred that PMOI had deliberately decided to end all military activities and had made this fact plain:

> "27. The PMOI's permanent cessation of any military activity is the result of a deliberate choice to abandon all military action and instead to use political will as a means of bringing about freedom and democracy in Iran. Taking account of domestic and international circumstances, the PMOI decided at an extraordinary Congress held in Iraq in June 2001, to put an end to its military activities in Iran (i.e. to all its military activities). The decision taken by the extraordinary Congress was ratified by the two ordinary congresses organised in early September 2001 and 2003. This policy has been stated publicly and the PMOI's leadership and membership signed statements to this effect.
>
> …
>
> **PMOI dissolved its operations units inside Iran**
>
> 28. It is generally accepted that the PMOI's military activities within Iran were organised by the organisation's internal branch there. Although independent in its activities, this branch nevertheless conformed to the decisions of the extraordinary Congress, thereby completely halting its operations. As a result, the internal branch lost its raison d'être and was definitively dissolved.
>
> …
>
> 29. On 6 September 2004, in a public and formal address, then PMOI Secretary General, Mrs Mojan Parsai, announced, *'As it has declared on many occasions, the People's Mojahedin Organisation of Iran condemns all forms of terrorism and has played a major role in a combating terrorism and fundamentalism under the banner of Islam – inspired by the clerical regime…*
>
> In February 2006, in her speech on the anniversary of the fall of the Shah, the PMOI's current Secretary-General, Ms Sedigheh Hosseini, who was elected in September 2005, again condemned violence and called for a peaceful solution. She said *'We have said before and reiterate now that we are categorically opposed to and condemn any type of violence.' She added, 'We announced our commitment to the call by the Iranian Resistance's President-elect in October 2003 for a referendum…* "

17. The application was refused in a letter ('the Decision Letter') written on behalf of the Secretary of State by the Minister of State, Mr Tony McNulty, dated 1 September 2006. That letter was in precisely the same terms as a draft that had been submitted to the Minister by officials on 26 August 2006 under cover of a submission dated 25 August 2006, which advised the Minister to refuse the application. The submission made, among others, the following points:

> “14. There does not appear to be any documentary confirmation of the formal decision to renounce violence referred to in June 2001 (or the subsequent decisions later in 2001 and in 2003). JTAC are also unaware of this assertion. The absence of any formal statement confirming the abandonment of terrorist activity could well be regarded as significant.
>
> …
>
> 15. Essentially the same point applies to the claim that the PMOI ‘internal branch [has been] definitively dissolved’ (i.e. its organisation within Iran). There does not appear to have been any formal statement to this effect. Clearly, both on this point and the one above, you should not rely simply on the absence of any formal announcement (or simply the fact that no document to such effect has been included with the application). However, in the absence of clear information from other sources the absence of any formal statements by the PMOI would appear to be a matter of some importance. In fact, one of the witness statements produced by the PMOI in 2002 claimed that the PMOI retained an armed wing in Iran.”

18. The reference to JTAC was to the Joint Terrorism Analysis Centre.

19. We can summarise the reasoning in the decision letter as follows. Up to “as recently as June 2001” the PMOI had, by its own admission, been responsible for extensive acts of terrorism. In those circumstances a clear and unequivocal renunciation of terrorism by PMOI was necessary to dispel the belief that PMOI remained concerned in terrorism. No such renunciation had been made. In these circumstances the Minister remained of the belief that the PMOI was concerned in terrorism. The following passages illustrate this reasoning.

> “9. By its own admissions, the PMOI/MeK had been committing extensive acts of terrorism as recently as June 2001. If I am to be persuaded that such an organisation is no longer ‘concerned in terrorism’ for the purposes of section 3(5) of the 2000 Act, I would expect (at least) a clear, voluntary, renunciation by its leadership of the organisation’s involvement in terrorism, together with a voluntary abandonment of its arms by its members. Neither the account of events in the document in support of the application nor the information otherwise available to me indicates that this has happened.
>
> …
>
> 13. Looking at the matter as a whole, and even though I accept that during the period between Summer 2001 and Spring 2003, the number of attacks claimed by the MeK declined substantially, I do not accept the contention that PMOI/MeK has voluntarily or unequivocally renounced the use of terrorism. As I have stated above, your application provides no

evidence in support of the contention that any such statement or definitive statement has been made, there is no such information available to me, and the statements made on behalf of the PMOI/Mek both in 2001 and 2002 would appear to be contrary to the contention advanced in your application.

…

14. Further, in order to be satisfied that an organisation that had been concerned in terrorism is no longer so concerned, I would also expect the organisation and its members to abandon arms voluntarily such that it was clear that the organisation had in fact renounced further terrorist activity.

22. In these circumstances, the events in Iraq do not lead me to conclude that the PMOI has ceased to be an organization concerned in terrorism. As indicated in paragraph 8 above, the PMOI/MeK has a long history of committing terrorist acts. There has been neither a properly published renunciation of the organisation's use of terrorism nor voluntary disarmament by its members. The events in Iraq indicate that its members had, for a significant period after June 2001 (the date your application indicates as the material date), retained their arms. Accordingly, even though there has been a temporary cessation of terrorist acts. I am not satisfied that the organisation and its member have permanently renounced terrorism…

23. Those members based in Iran are referred to in paragraph 28 of the document in support of the application. I note from that paragraph that what it describes as the 'PMOI's military activities' within Iran were 'organised by the organisation's internal branch there'. I also note the assertion that this branch was 'independent in its activities', but nevertheless halted its operations in response to the decisions of the extraordinary Congress and subsequently 'was definitively dissolved'. No evidence in support of these assertions is provided in the annexes to the application and I have no evidence from other sources to support these assertions. I am not in a position to assess whether any cessation of terrorist acts in Iran was in response to the alleged decisions of the extraordinary Congress or dictated by other reasons. Mere cessation of terrorist acts do not amount to a renunciation of terrorism. Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future."

POAC'S decision

20. POAC held both open and closed hearings in accordance with the Proscribed Organisations Appeal Commission (Procedure) Rules 2007 ('the Rules'). In the latter hearing the interests of the respondents were represented by special

advocates. POAC's open and closed judgments were delivered on 30 November 2007. The Open Determination was 144 pages in length. The overall conclusions of POAC were accurately summarised by Mr Swift in his skeleton argument as follows: first, that in concluding that the PMOI was an organisation concerned in terrorism, the Secretary of State had misconstrued the provisions of section 3(5) TA 2000 and failed to direct himself properly as to those provisions of the TA 2000; secondly that in concluding that the PMOI was an organisation concerned in terrorism, the Secretary of State had failed to have regard to relevant considerations; and thirdly, that the conclusion reached by the Secretary of State that the PMOI was an organisation concerned in terrorism was perverse.

21. POAC's Open Determination was based exclusively on the open material. We consider that it could properly have indicated in general terms the extent to which, if at all, its conclusions were reinforced by material that it received in closed session. This would seem permitted, if not required, by Rule 28 (3) of the Proscribed Organisation Appeal Commission (Procedure) Rules 2007 which provides:

> "Subject to Rule 29, the Commission must serve on the parties and any special advocate a written determination containing its decision and, if and to the extent that it is possible to do so without disclosing information contrary to the public interest, the reasons for it. "

We propose in the first instance to base our conclusions on the open material but will state, in so far as appropriate, the effect on these of the closed material.

The issues

22. The applicant's decision whether to deproscribe PMOI involved two stages. First she had to decide whether she believed that PMOI was 'concerned in terrorism'. If so, she had to decide as a matter of discretion whether the proscription of PMOI should be continued. She decided both questions affirmatively. There is now no issue that, if her decision in relation to the first question was correct, the answer that she gave to the second question fell properly within her discretion. The issue is whether the affirmative answer that she gave to the first question can be justified.

23. The grounds of appeal that the applicant seeks to advance are as follows:

    i) that the Commission erred in its approach to the application of section 3(5)(d) TA (when read together with section 3(4) TA);

    ii) that the Commission unlawfully substituted its own conclusion as to whether the PMOI was an organisation concerned in terrorism for the conclusion of the Secretary of State;

iii) that the Commission wrongly concluded that the Secretary of State had, in concluding that PMOI was an organisation concerned in terrorism, failed to have regard to relevant considerations;

iv) that the Commission's conclusion that the decision of the Secretary of State that PMOI was concerned in terrorism was perverse was itself a conclusion that is perverse in law; and

v) that in any event, if the Commission had allowed the Respondent's appeal, it should have remitted the question of whether or not PMOI was an organisation concerned in terrorism to the Secretary of State for reconsideration.

24. The critical ground of appeal is the first. We can summarise the applicant's case as follows:

i) Whether, on a true construction of section 3(5)(d), PMOI was 'concerned in terrorism' depended critically on the intention of the leaders of PMOI as to its future conduct.

ii) Determining the future intention of the leaders of PMOI was a matter of assessment or evaluation.

iii) The applicant's evaluation of the future intention of the leaders of PMOI led her to believe that PMOI was concerned in terrorism. Accordingly she decided to refuse the application to de-proscribe PMOI.

iv) In reviewing that decision POAC should have applied a *Wednesbury* test and, in doing so, should have shown deference to the applicant's decision.

v) Had POAC adopted such an approach, it would not have found that the applicant's decision was flawed.

vi) POAC erred in construing section 3(5)(d) as requiring a current involvement with or capacity to engage in terrorist activities in order to render an organisation 'concerned in terrorism.'

vii) POAC wrongly held that the applicant had not considered the correct question.

viii) POAC then, inappropriately, subjected the applicant's conclusion to "an intense and detailed scrutiny."

ix) POAC then improperly substituted its own conclusions for those of the applicant and, perversely concluded that her decision was perverse.

25. We can summarise the respondents' case as follows.

i) The applicant's decision interfered with fundamental human rights and, accordingly, POAC correctly subjected it to 'intense scrutiny'.

ii) POAC correctly concluded that the applicant had not asked herself the right question.

iii) POAC correctly concluded that the applicant had not taken into account all the relevant considerations.

iv) POAC correctly concluded that had the applicant asked herself the right question and taken into account all relevant considerations she could not have concluded that PMOI was concerned in terrorism but would have been bound to conclude that PMOI was not concerned in terrorism. Accordingly her decision was perverse.

'Otherwise concerned in terrorism'

26. It is common ground that the application for deproscription required the applicant to decide whether she remained of the belief that PMOI was concerned in terrorism within the meaning of section 3(5) of the TA 2000. It is also common ground that, at the time of the applicant's decision, PMOI did not fall within section 3(5)(a)(b) or (c). Thus the question for the applicant was whether she believed that PMOI was "otherwise concerned in terrorism" within the meaning of section 3(5)(d). That question first required the applicant to decide upon the meaning of 'otherwise concerned in terrorism'. We propose to consider the meaning that the applicant contends that she accorded, or should have accorded, to that phrase, then to consider the meaning given to it by POAC and finally to give our view of the correct meaning.

The applicant's definition

27. In paragraph 7 of her decision letter the applicant stated "I have decided that the PMOI remains an organisation concerned in terrorism for the purposes of the 2000 Act." Nowhere did she state what she meant by "concerned in terrorism". Her starting point was that, up to June 2001, PMOI had been committing extensive acts of terrorism (paragraph 9). That meant that up to June 2001 PMOI was 'concerned in terrorism' by virtue of section 3(5)(a). Next she stated that she 'accepted' that between the summer of 2001 and the spring of 2003 "the number of attacks claimed by [PMOI] declined substantially" (paragraph 13). Thereafter she accepted that there had been what she described as a "temporary cessation of terrorist acts" (paragraph 22). Implicit in this finding was an acceptance that PMOI ceased to fall within the definition in section 3(5)(a). The question then arose of whether PMOI remained "otherwise concerned in terrorism" under section 3(5)(d). The applicant's reasoning appears to have been that PMOI remained 'concerned in terrorism' because she had "reason to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future" (paragraph 23).

28. At one stage in his argument Mr Swift advanced an argument that appeared to accord with this reasoning. He suggested that if PMOI posed a 'threat' of terrorist action this would constitute being 'concerned in terrorism' by virtue of the reference to 'threat' in the definition of terrorism in section 1(1) of TA

2000. On reflection he accepted, however, that to constitute terrorism such a threat had to be an overt threat communicated by the organisation. What then, were the qualities of PMOI that gave rise to the belief that it fell within the definition of 'otherwise concerned in terrorism'?

29. Mr Swift's very lengthy skeleton argument does not provide an answer to this question. The nearest that it comes to doing so is in the following passage:

> "In principle, section 3(5)(d) TA is sufficiently broad as to encompass a situation such as that under consideration by the Commission in the present case – i.e. of an organisation that has previously undertaken acts falling within sections 3(5)(a)-(c) TA, which has then not undertaken such acts for a period of time, but in relation to which the reason for such recent inactivity, and whether it is temporary, or tactical or permanent, forced or voluntary, all remain unclear."

This is not, however, a definition of 'otherwise concerned in terrorism' but an expression of the difficulty that there may be in deciding on the implications of a cessation from terrorist activity. Thereafter the skeleton attacks POAC's definition of the sub-section without suggesting any alternative other than to postulate that whether an organisation falls within the sub-section will be "highly fact-sensitive" (paragraph 47) and "highly evaluative", possibly calling for, *inter alia*, an evaluation of the organisation's "strategic and ideological objectives" (paragraph 53).

30. In oral argument Mr Swift suggested that PMOI was 'otherwise concerned in terrorism' if the organisation was maintained with the same structure and membership, with the same objective of bringing down the current Iranian theocracy and with the intention of resorting to terrorism if and when circumstances permitted this. In so far as 'being concerned in' connoted some activity or action, the act of maintaining the organisation sufficed to satisfy this requirement. Mr Swift submitted that in the absence of a clear renunciation of terrorism the applicant was entitled to believe that PMOI satisfied all of these criteria.

POAC's definition, which the respondents support

31. POAC set out its conclusions as to the meaning of 'concerned in terrorism' in the following paragraphs of its Open Determination:

> "124. In our view the criteria set out in sub-sections 3(5)(a) to (c) are focussed on current, active steps being taken by the organisation. There could be reasonable grounds for a belief that the organisation is concerned in terrorism based on the organisation's past activities, but that material would have to be such that it gave reasonable grounds for believing that the organisation was currently engaged in any activities specified in those three subsections. If the acts relied on occurred shortly before the decision being made by the Secretary of State they would be likely to provide powerful evidence to justify his

belief, even in the absence of specific material that the organisation was at the time of the decision actively involved in, for example, planning a particular attack. Conversely, if the acts relied on occurred in the distant past, they would, without more, be unlikely to provide a reasonable basis for such a belief. Other factors would also affect the judgment to be made. We know only too well from the atrocities committed in the West in the last few years that some terrorist attacks can take many years to plan and execute, often using 'sleepers' I the target country. With such organisations, the lapse of a significant period of time between attacks may not be as significant as for organisations who, to all intents and purposes, are engaged in all-out military assault on the Government of a particular country.

125. Section 3(5)(d) of the Act is, however, rather different. It is clearly intended to be a general provision which sweeps up organisations who are "*concerned in terrorism*" that are not caught by the earlier subsections. We should note that defining a statutory test of "*is concerned in terrorism*" in terms that "*an organisation is concerned in terrorism…if it is otherwise concerned in terrorism'* is not, at first sight, particularly helpful or illuminating.

126. For present purposes, taking account of the definition of terrorism in section 1 of the Act, the full meaning of the subsection is *'otherwise concerned in the use or threat of action (as defined in section 1(2) of the Act) inside or outside the UK where the use or threat is designed to influence the government or to intimidate the public or section of the public (including a government and/or the public of a country other than the UK) and is made for the purpose of advancing a political, religious or ideological cause'*. 'Concerned' in subsection 3(5)(d) must be activity ('action') of a similar character to that set out in the subsections 3(5)(a) to(c).

127. In our view, this could include an organisation which has retained a military capability and network which is currently inactive (i.e. not currently committing, participating in or preparing for terrorism) for pragmatic or tactical reasons, coupled with the intent of the organisation or members of it to reactivate that military wing (i.e. to commit, participate in or prepare for terrorism) in the future if it is perceived to be in the organisation's interests so to do. It would not, however, include an organisation that simply retained a body of supporters, without any military capability or any evidence of, for example, attempts to acquire weapons or to train members in terrorist activity, even if the organisation's leaders asserted that it might, at some unspecified time in the future, seek to recommence a campaign of violence. It cannot be said of an

> organisation in the latter category that a reasonable person could believe that it *'is otherwise concerned in terrorism'* – i.e. that it is currently concerned in terrorism – merely because it *might* become involved in terrorist activity at some future date.
>
> 128. Furthermore the fact that the leaders of an organisation may, as between themselves, hold the view that a future resort to violence could not be excluded, would not meet the statutory requirement, unless it was coupled with some material to show that there were reasonable grounds for believing that the organisation was deliberately maintaining a military capability to carry that plan into effect or that positive steps were being taken at the time to acquire such a capability. Merely contemplating the prospect of future activity or expressing the desire to be a terrorist in the future without the ability to carry that into effect does not fall, without more, into any of the subsections of section 3(5). (Clearly it would be different if the organisation in such circumstances published an exhortation to commit acts of terrorism against a particular state or 'glorified' the acts of others who had conducted such acts because it would fall within section 3(5)(c).)"

32. The respondents support POAC's definition of 'otherwise concerned in terrorism'.

Our conclusions

33. The difficulty of defining 'otherwise concerned in terrorism' can be illustrated by reference to the provisions of section 3(8) of the Northern Ireland (Sentences) Act 1998 which required the Secretary of State to specify an organisation

> "which he believes-
>
> (a) is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and
>
> (b) has not established or is not maintaining a complete and unequivocal ceasefire."

34. That legislation, in contrast to that with which we are concerned, draws a distinction between being concerned in terrorism and being concerned in promoting or encouraging terrorism. It also makes it clear that an organisation can be so concerned, notwithstanding that it is inactive in consequence of a ceasefire.

35. While we agree with the broad thrust of the conclusions reached by POAC, which we have set out in paragraph 31 above, we consider that the manner in which these are expressed is a little confusing. The last sentence of POAC's paragraph 126 cannot readily be reconciled with the first sentence of their paragraph 127. We think that the former would be better deleted.

36. The reason why the organisation described by POAC in the first sentence of paragraph 127 falls within section 3(5)(d) of TA 2000, rather than section 3(5)(a) is because it is currently inactive. The reason why it is nonetheless 'otherwise concerned in terrorism' is because it retains its military capacity for the purpose of carrying out terrorist activities. The nexus between the organisation and the commission of acts of terrorism is close and obvious.

37. We agree with POAC that an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be 'concerned in terrorism' simply because its leaders have the contingent intention to resort to terrorism in the future. The nexus between such an organisation and the commission of terrorist activities is too remote to fall within the description 'concerned in terrorism'.

38. An organisation that has temporarily ceased from terrorist activities for tactical reasons is to be contrasted with an organisation that has decided to attempt to achieve its aims by other than violent means. The latter cannot be said to be 'concerned in terrorism', even if the possibility exists that it might decide to revert to terrorism in the future.

39. Support for these conclusions can be derived from section 11 of the Act which makes it an offence to belong to a proscribed organisation but then provides that it shall be a defence for a member to prove "that he has not taken part in the activities of the organisation at any time while it was proscribed". It seems to us implicit in this provision that the essence of the criminal offence of belonging to a proscribed organisation is the taking part in activities that, directly or indirectly, lend support to terrorism. It is also implicit that the legislation is aimed against organisations that are carrying on activities connected with terrorism.

The approach to review

40. POAC devoted 26 pages of its Determination to the question of the intensity of the review that it was required to conduct of the applicant's decision. These pages included lengthy citation from *Secretary of State v Home Department* [2003] 1AC 153; *R v Shayler* [2003] 1 AC 247; *A and Others v Secretary of State for the Home Department (N0 2)* [2005] 1 WLR 414 and *Secretary of State for Home Department v MB* [2007] QB 415. They also referred to *The Queen (on the application of the Kurdistan Workers Party and Others) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin). This was an application by PMOI among others for permission to challenge its proscription by judicial review. In refusing the application Richards J held that POAC was the appropriate tribunal to consider the claims, observing at paragraph 79 that they depended heavily on a scrutiny of all the evidence, including any sensitive intelligence information, concerning the aims and activities of the organisations concerned and a comparison between them and other organisations proscribed and not proscribed. He also observed in the previous paragraph that POAC had been designated as the appropriate tribunal for the purposes of section 7 of the Human Rights Act in respect of

proceedings against the Secretary of State in respect of a refusal to deproscribe.

41. In the light of these authorities POAC concluded that it accorded with the will of Parliament that POAC should subject both stages of the Secretary of State's decision to intense scrutiny. POAC concluded:

> "It is not our function to substitute our view for the decision of the Secretary of State. Ultimately at the First Stage the question remains whether a reasonable decision maker could have believed that the PMOI '*is concerned in terrorism'* on the basis of all of the evidence that is now before us. It is our function, however, to scrutinise all of the material before us carefully and to examine its strengths and weaknesses to see if it provides reasonable grounds for the Secretary of State's belief. At the Second Stage, we must scrutinise all of the material to see if it provides a reasonable basis for the exercise of his discretion."

42. Mr Swift sought to persuade us that this conclusion was erroneous. He sought to equate the applicant's consideration of whether PMOI was concerned in terrorism with consideration of whether an individual is likely to be a threat to national security (*Rehman)* or whether an emergency exists threatening the life of the nation *(A v Secretary of State for the Home Department).* All three questions, he submitted, involved evaluation in a field where the Secretary of State and her advisers had special expertise to which the courts should defer.

43. We do not consider that the comparison is apt. The question of whether an organisation is concerned in terrorism is essentially a question of fact. Justification of significant interference with human rights is in issue. We agree with POAC that the appropriate course was to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that PMOI was concerned in terrorism.

44. On the facts of this case the question of the approach to POAC's review, debated at such length, proved academic, for POAC held that even the application of the conventional *Wednesbury* test led to the conclusion that the applicant's decision was flawed.

45. Mr Swift submitted that POAC did not merely review the decision of the applicant according to the principles applicable on an application for judicial review but substituted its own decision for that of the applicant. We do not accept this submission. POAC reached the conclusion that the applicant had asked herself the wrong question when reaching her decision after failing to take into account matters that she should have considered. POAC set out the matters that the applicant should have taken into account. This involved one finding of fact that was in conflict with a finding implicitly made by the applicant, but in rejecting the applicant's finding POAC held that no reasonable person could have made it. Finally POAC asked the question whether, applying what it considered to be the right test, any reasonable

person could have concluded that PMOI was concerned in terrorism and concluded that any reasonable person would have reached the opposite conclusion. We do not consider that POAC's approach can be faulted.

46. We have concluded that POAC's interpretation of section 3(5) of the TA 2000 was essentially correct and that POAC approached its task correctly in subjecting the applicant's decision to intense scrutiny, thereby carrying out a review according to the principles of judicial review that apply where a decision affects fundamental human rights. It remains to consider whether, applying this approach, POAC correctly concluded that the applicant's decision was perverse or whether, as Mr Swift submitted, POAC's own decision was perverse.

The material facts

47. As we have shown, the question that the applicant appears to have asked was whether there was reasonable cause to believe that PMOI might resume terrorist activities in the future. POAC ruled, correctly in our view, that on the facts of this case the applicant should have asked the question whether there was reasonable cause to believe that PMOI was maintaining a military capability or taking active steps towards acquiring one with a view to a resumption of terrorist activities. Whichever question was correct, however, it seems to us that the material that needed to be considered to answer it was essentially the same.

48. Mr Swift placed reliance on the following conclusions of POAC:

> "(i) PMOI had been engaged in persistent terrorist activity over a number of years; its claim to have renounced terrorism in June 2001 (or thereafter) was one the Secretary of State was not required to accept;
>
> (ii) its claim thereafter to have retained military equipment for the purposes of self-defence was a claim that the Secretary of State was not required to accept;
>
> (iii) its further claim "voluntarily" to have surrendered its military equipment in 2003 was not a claim that the Secretary of State was required to accept; and
>
> (iv) PMOI was an organisation that often made public statements that were self-serving, and that the Secretary of State was entitled to disbelieve."

He submitted in his skeleton argument that in the light of these facts the applicant was required to "evaluate and assess all material circumstances and

not restrict that consideration to the matters identified by the Commission". Later he added: "In a situation where an organisation has a long and active history of committing acts of terrorism, the Secretary of State was plainly entitled to be cautious when considering and assessing an application for deproscription based upon an assertion that that organisation had renounced violence."

49. Mr Pleming QC for the respondents submitted that the applicant mis-characterised the respondents' case. It was not founded on an alleged renunciation of violence but on the fact that, at the time of the application, PMOI was not an organisation concerned in terrorism, as defined by the TA 2000. He further submitted that Mr Swift's summary of the facts found by POAC was selective. He referred us to the following specific findings by POAC, emphasising where it appeared, the use of the word 'only'.

> "For the reasons set out below, we believe that the only conclusion that a decision-maker could reasonably come to in the light of [the] material [before POAC] is that –
>
> (a) there was a significant change in the nature of the PMOI's activities in 2001 and thereafter, and
>
> (b) in particular, there have been no offensive operational attacks by the PMOI operatives inside Iran since August 2001 or, at the latest, May 2002,
>
> (c) the nature of the rhetoric employed in their publications and propaganda by the PMOI and other, related, organisations such as NCRI, changed significantly during 2001 and 2002 such that, from 2002, we were not shown any material which either claimed responsibility for any acts that could fall within the definition of terrorism for the purposes of the Act or even reported the actions of others carrying out such activities,
>
> (d) although the PMOI maintained a military division inside Iraq (the National Liberation Army), it was completely disarmed by the US military following the invasion of Iraq, and
>
> (e) there is no material that the PMOI has sought to restore or bolster its military capability (for example by purchasing weapons, recruiting or training personnel to carry out acts of violence against Iran or other interests).

Putting aside for the moment the assertion that a positive decision to cease all military operations was taken at an extraordinary Congress in June 2001, having considered all of the material before us we are satisfied that the only conclusion that a reasonable decision-maker could reach is that the PMOI's policies and activities changed fundamentally in the summer/autumn of 2001.

Given the absence of any material to the contrary, the only conclusion that a reasonable decision maker could reach is that, since the disarmament of the PMOI/NLA in Iraq [in 2003], the PMOI has not taken any steps to acquire or seek to acquire further weapons or to restore any military capability in Iraq (or, indeed, elsewhere in the world). The PMOI has not sought to recruit personnel for military-type or violent activities, the PMOI has not engaged in military-type training of its existing members and the PMOI has not sought to support others (i.e. other individuals or groups) in violent attacks against Iranian targets.

In our view, on all the relevant material a reasonable decision maker could only come to the conclusion that either there never was (contrary to the earlier claims of the PMOI) any military command structure or network inside Iran after 2001 or that, by some time in 2002, any such structure or network had been dismantled. There is no evidence of any present operation military structure inside Iran which is used to plan, execute or support violent attacks on Iranian targets. Nor is there any evidence that the PMOI has retained military operatives inside Iran with the intention of carrying out such attacks. That is consistent with the evidence that the PMOI has not carried out any attacks since August 2001, or May 2002 at the latest, and the absence of any evidence suggesting that the PMOI have attempted (whether in Iraq or Iran or, indeed elsewhere) to acquire weapons or a military capability following its disarmament in Iraq in 2003.

On the basis of the material before us, to the extent that the PMOI has retained networks and supporters inside Iran, since, at the latest, 2002, they have been directed to social protest, finance and intelligence gathering activities which would not fall within the definition of 'terrorism' for the purposes of the 2000 Act."

50. On the respondents' case it was immaterial what motivated PMOI in ceasing from all activity that was in any way related to terrorism from 2002 onwards. On the applicant's case it was critically important to form a view as to whether PMOI had an intention to revert to terrorist activities if and when in the future circumstances permitted. So far as the decision letter was concerned the most recent terrorist activity referred to was that implicit in the statement "during the period between Summer 2001 and Spring 2003 the number of attacks claimed by the [PMOI] declined substantially". As POAC pointed out (paragraph 345) the inference that there were a number of attacks between summer 2001 and spring 2003 was not supported by any evidence. There was only one attack in respect of which PMOI had momentarily claimed responsibility before issuing a correction to withdraw that claim.

51. The decision letter referred to no activity or statement after 2003 that supported the conclusion that PMOI retained an intention to involve itself in terrorist activities. One such matter was raised, however, by a Mr Benjamin Fender, of the Foreign & Commonwealth Office, who "contributed to the process that informed the Home Secretary's consideration of the Appellants' application for deproscription". He identified Mr and Mrs Rajavi as the main authorities and spokesmen of PMOI, commented that their views on the use of violence against the Iranian regime remained ambiguous and stated, "by way of example" that Maryam Rajavi declined to rule out armed intervention when she was interviewed by the Los Angeles Times on 1 February 2006". Mr Swift relied upon this evidence and criticised POAC for substituting its own assessment of it.

52. What POAC did was to subject Mr Fender's assertion to some intense and productive scrutiny. POAC concluded (i) that this piece of evidence was selective, in that there was evidence of public statements by Mrs Rajavi that could be "read sympathetically as a rejection of violence", (ii) that the LA Times report was unreliable, (iii) that the selection of that one report from a large number of reports of speeches by Mrs Rajavi "suggests that what Mr Fender may have done since the date of the Secretary of State's decision is to search for evidence to support a particular case rather than to put forward the evidence relevant to the issue that was relied upon in September 2006", (iv) that the report did not provide material that could have assisted the Secretary of State in reaching a reasonable belief as to the current policy of PMOI to future violent action and (v) that the report does not appear in fact to have formed any part of the Secretary of State's decision making process. In these circumstances we do not consider that the report adds anything to the applicant's case.

53. The reality is that neither in the open material nor in the closed material was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future.

54. We come back to the statement in the decision letter that, so it seems to us, encapsulated the reasoning of the applicant:

> "Mere cessation of terrorist acts do not amount to a renunciation of terrorism. Without a clear and publicly

> available renunciation of terrorism by PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future." (paragraph 23)

To this can be added the applicant's statement

> "…I believe that I continue to be entitled to have regard to what the nature and scale of activities was relatively recently in determining the application. This issue would not, of course, arise if the organisation has clearly ceased to be "concerned in terrorism". However, as it has not (in my belief) ceased to be so concerned, I believe that I can consider the nature and scale of the activities that were demonstrated only five years ago".(paragraph 26)

55. POAC commented that such an approach "turns the statutory test on its head". We agree. POAC's conclusions appear in the following paragraphs:

> "348…there is no evidence that the PMOI has at any time since 2003 sought to re-create any form of structure that was capable of carrying out or supporting terrorist acts. There is no evidence of any attempt to 'prepare' for terrorism. There is no evidence of any encouragement to others to commit acts of terrorism. Nor is there any material that affords any grounds for a belief that the PMOI was 'otherwise concerned in terrorism' at the time of the decision in September 2006. In relation to the period after May 2003, this cannot properly be described as 'mere inactivity' as suggested by the Secretary of State in his Decision Letter. The material showed that the entire military apparatus no longer existed whether in Iraq, Iran or elsewhere and there had been no attempt by the PMOI to re-establish it.
>
> 349. In those circumstances, the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before us, the PMOI is not and, at September 2006, was not concerned in terrorism."

For the reasons that we have given we can see no valid ground for contending that, in reaching these conclusions, POAC erred in law.

The appropriate order

56. We consider that the only arguable ground of appeal relates to the construction of section 3(5)(d) of the TA 2000. We have considered what the consequence would have been had POAC accepted the submission that an organisation that was actively concerned in terrorist activities can be "otherwise concerned in terrorism" if it has no military capability and has been involved in no activities

connected with terrorist acts or with the preparation for such acts for as long as five years provided only that the organisation is inactive for pragmatic reasons and retains the intention to resort to terrorist activities when circumstances permit. POAC expressed doubt as to whether "the material before us could lead to a conclusion that the PMOI did retain a will of that nature". We understand that the 'material' referred to was the open material.

57. Closed material was also available to the applicant. We have considered that material. It has reinforced our conclusion that the applicant could not reasonably have formed the view when the decision letter was written in 2006 that PMOI intended in future to revert to terrorism.

58. In these circumstances we consider that the appeal that the applicant wished to bring had no reasonable prospect of success and that the appropriate course is to dismiss her application.