Neutral Citation Number: [2022] EWHC 2380 (Admin)

Case No: CO/4266/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2022

Before

MR JUSTICE SWIFT

- -

Between

THE KING

on the application of

ALO and others **Claimants**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Tim Owen KC, Rehana Popal, James Fraczyk (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Samantha Broadfoot KC, Ben Fullbrook (instructed by **GLD**) for the **Defendant**

Angus McCullough KC, **Dominic Lewis**, **Special Advocates** (instructed by **SASO**)

Hearing dates: 12 and 13 May 2022

- -

APPROVED OPEN JUDGMENT

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives.
The date and time for hand-down is deemed to be at 10:00 am on 22/09/2022

MR JUSTICE SWIFT

A. Introduction

1. The First Claimant is an Afghan national who, sometime ago, worked for approximately 4 months, as an interpreter for the British military in Afghanistan. The Second Claimant is the First Claimant's wife. The remaining Claimants are their children.

2. In April 2021 the Secretary of State for the Defence and the Secretary of State for the Home Office opened the Afghan Relocation and Assistance Policy ('the ARAP') to receive applications for assistance from persons who were or had been employed in Afghanistan by Her Majesty's Government. Assistance would be provided if they applicant was considered to be "at serious risk of threat to life". Successful applications fell into four categories. Category 1 comprised persons judged to be at "high and imminent risk of threat to life". They would be offered immediate relocation to the United Kingdom. Category 2 comprised persons who had worked in roles considered to have made a material difference "to the delivery of the UK mission in Afghanistan", which had exposed the person to public recognition as an employee, and left them at risk because of changing circumstances in Afghanistan. This class could also seek relocation to the United Kingdom. Category 3 comprised persons not eligible for relocation but who could be provided with other forms of assistance. Category 4 comprised special cases. The assistance provided to such persons was considered case by case. The ARAP provided that persons eligible for relocation "will have the opportunity to apply for limited leave to enter the UK". In this way, the ARAP provided a gateway to application for a visa under the Immigration Rules.

3. The First Claimant made an application under the ARAP for himself, his wife and children. By letter dated 14 May 2021 he was informed that his application had been successful and that he was eligible for relocation to the United Kingdom. The letter went on to explain that to be able to relocate, the First Claimant had to meet the requirements of paragraph 276BA1 of the Immigration Rules. That paragraph provides:

> "A person seeking to come to the UK as a relevant Afghan citizen must apply for and obtain entry clearance as a relevant Afghan citizen before they arrive in the UK"

4. The effect of paragraph 276BA2 is that an application for entry clearance will fail if any of the grounds of refusal at Part 9 of the Immigration Rules applies. The grounds within Part 9 include paragraph 9.3.1 which requires the Secretary of State for the Home Department to refuse an application for entry clearance "… when the applicant's presence in the UK is not conducive to the public good because of their conduct, character, associations or other reason …".

5. On 2 June 2021 the Claimants made applications for entry clearance under the Immigration Rules; the First Claimant on the basis he was a "relevant Afghan citizen" as defined at paragraph 276BB1 of the Immigration Rules; the other Claimants as dependants of the First Claimant. By letters dated 30 July 2021 each application was refused. The letter to the to the First Claimant stated as follows:

> "**The decision**
>
> You have sought entry to the United Kingdom as a relevant Afghan citizen, however your presence in the UK has been assessed as not conducive to the public good on grounds of national security due to your conduct, character and associations. I am therefore satisfied that our presence in the UK would not be conductive to the public good. I therefore refuse your entry clearance to the UK under paragraph 276BC1 and 9.3.1 of Part 9 of the Immigration Rules."

6. The applications of each of the other Claimants were refused because the First Claimant was considered to "[constitute] a danger to the community or to the security of the United Kingdom".

7. The Claimants challenged these decisions in judicial review proceedings commenced in August 2021. In those proceedings, the Claimants contended that the Secretary of State had acted unlawfully: (a) by failing to give reasons for her decision; (b) by not giving the First Claimant the opportunity to make representations on matters of concern prior to the decision to refuse the applications; (c) because the decision to refuse the First Claimant's application was irrational (with the consequence that the decisions refusing the applications of the other Claimants were erroneous); (d) because automatic refusal of the applications made by the Second to Ninth Claimants, consequent on the refusal of the application made by the First Claimant was unlawful; and (e) because the decisions had failed to take account of relevant matters, or were reached by the Secretary of State in breach of her policy. On 22 October 2021 those proceedings were withdrawn because the Secretary of State had agreed to withdraw the 30 July 2021 decisions and reconsider the visa applications.

8. On 10 November 2021 the Secretary of State issued new direction letters. These decisions refused the applications for entry clearance. The material part of the letter sent to the First Claimant stated:

> "**The decision**
>
> You were previously informed of the decision to refuse your visa application in a refusal notice dated 30 July 2021. Following representations made by yourself and dependant family members, we agreed to reconsider your visa applications by Wednesday 10 November 2021. We have undertaken a thorough reconsideration of your visa application for Limited Leave to Ener as a relevant Afghan citizen, taking into account all of the information available to us, including the representations you have put forth in witness statements. Our new decision is outlined below:
>
> You have sought entry clearance to the United Kingdom as a relevant Afghan citizen, however your presence in the UK has been assessed as not conducive to the public good on grounds of

> national security due to your conduct, character and associations. I am therefore satisfied that your presence in the UK would not be conducive to the public good. I therefore refuse you entry clearance to the UK under Paragraph 276BC1 and 9.3.1 Part 9 of the Immigration Rules."

9. In consequence, the applications made by each the Second to Ninth Claimants were, again, refused.

10. The present judicial review proceedings were issued on 17 December 2021. The Statement of Facts and Grounds advanced eight grounds of challenge. At the beginning of the hearing, Mr Owen KC for the Claimants stated that Grounds 5 to 8 were no longer pursued. The four remaining Grounds are to the following effect. Ground 1 is that the Secretary of State has failed to give reasons for her decisions, contrary to the common law obligation of fairness. The focus of this ground is the decision refusing the First Claimant's application. Ground 2 is that the consequence of the Secretary of State's failure to give reasons is that the determination of the substantive dispute – i.e., whether the Secretary of State has acted unlawfully in refusing the First Claimant's application under the Immigration Rules – cannot be resolved consistent with the requirements of European Convention of Human Rights article 6. For this Ground too, the focus must be on the Secretary of State's approach to explaining why the First Claimant's application was refused. Ground 3 is that the decisions were taken unfairly because there was no 'minded to' stage – no opportunity for the Claimants (here again, the position of the First Claimant is key) to be told about and respond to the matters which made it likely that the First Claimant's application would be refused. Ground 4 is that the Secretary of State's assessment that the First Claimant's presence in the United Kingdom would not be conducive to the public good "on grounds of national security due to [his] conduct, character and associations" was not based on reasonable enquiry, rested on a flawed assessment of the information available, and/or failed to take account of the relevant matters.

11. These proceedings have been conducted using the closed material procedure permitted under Part 2 of the Justice and Security Act 2013. The Secretary of State's contention, which the Claimants accepted, was that, absent a closed material procedure, her defence to the claim would require disclosure of information which, if disclosed, would damage the interests of national security. The consequence of the closed material procedure is that some of the material disclosed by the Secretary of State in response to the claims ("the closed material") was not disclosed to the Claimants or their legal representatives, but instead provided only to Special Advocates appointed at the request of the Court to represent the Claimants' interests so far as concerns that material. Also, part of the hearing was conducted in private, in the absence of the Claimants and their representatives, albeit again with the assistance of the Special Advocates. A further consequence of the closed material procedure in this case is that part of the reasons in this judgment will not be made public and will not be provided to the Claimants or their legal representatives. This must be so to prevent disclosure of material that would be damaging to the interests of national security. That part of the judgment will be provided only to the Secretary of State and to the Special Advocates.

12. I will consider the four Grounds of challenge out of the order in which they are pleaded. I will first consider Ground 2. If the Claimants are correct on this point, the evidential premise for these proceedings would need to be reconsidered. If that were necessary, consideration of the other three Grounds would need to await that process. Then I will consider Ground 4, since that goes to the substance of the decisions taken by the Secretary of State. A significant part of my reasons on this Ground will need to consider closed evidence and so will appear only in the closed part of this judgement. Lastly, I will address Grounds 1 and 3, which concern the fairness of the process followed by the Secretary of State when she reached the decisions now under challenge.

B. Decision

(1) Ground (2). The failure to give reasons renders it impossible to conduct these proceedings so as to meet the requirements of the ECHR article 6

13. The premise of this ground of challenge is that the reasons the Secretary of State provided for refusing the First Claimant's application under the Immigration Rules are not sufficient for him to be able to contest the decision on public law grounds. The First Claimant does not know enough about the Secretary of State's reasons to be able to know whether she took account only of relevant information, took relevant and rational steps to equip herself with information sufficient steps to equip herself with information sufficient to decide whether the First Claimant's presence in the United Kingdom was not conducive to the public good, or reached a decision rationally open to her on the information available when the decision was taken.

14. The Claimants submit that the First Claimant should be provided with reasons sufficient to meet the standard set out by the House of Lords in *Secretary of State for the Home Department v AF (No.3)* [2010] 2 AC 269. That case concerned challenges to decisions applying control orders in proceedings that were also conducted using a closed material procedure involving the use of Special Advocates. The House of Lords, (following the decision of the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625) accepted that article 6 imposed minimum requirements for disclosure to a claimant that could not be satisfied by disclosure only to a Special Advocate. As a minimum, disclosure to a claimant had to comprise sufficient information about allegations made against him to enable him to give effective instructions to his lawyers and the Special Advocates in respect of those allegations: see per Lord Phillip at paragraph 59, Lord Hope at paragraph 81, and Lord Brown at paragraph 119.

15. The Secretary of State does not contend that the reasons given in the 10 November 2021 letter were sufficient to meet the *AF (No. 3)* standard. Her response to the Claimants' submission is *first*, that article 6 does not apply to these proceedings either (a) because at the time the November 2021 decisions were taken the Claimants were not within the jurisdiction of the United Kingdom for the purposes of article 1 ECHR or (b) because entry clearance decisions do not give rise to any determination of civil rights and obligations and for that reason are beyond the scope of article 6, and *second* that even if article 6 does apply, there is no requirement in this case for the level of disclosure specified in *AF (No. 3)* because this was not an occasion when the State was applying a coercive measure to any individual.

16. I accept the Secretary of State's submission that article 6 does not apply to these proceedings because they do not entail determination of any civil right or obligation. This conclusion is an inevitable consequence of the judgment of the European Court of Human Rights in *Maaouia v France* (2001) 33 EHRR 42. That case concerned proceedings consequent on a deportation order. The Court concluded (at paragraph 38) that the subject matter of the proceedings did not concern the determination of a civil right within the meaning of article 6(1). The Court recognised that deportation could have major repercussions for a person's family and private life or on other matters – such as employment – that might be the subject of article 6 civil rights. However, that did not bring the challenge to the deportation order within the scope of article 6. At paragraph 40 of its judgment, the Court went on to say this:

> "The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or a criminal charge against him, within the meaning of Article 6(1) of the Convention."

17. In its judgment in *MN v Belgium* (Application 3599/18, judgment 5 March 2020), the Court repeated this conclusion: see that judgment at paragraph 137. The Court went on to state that the simple fact that a dispute was before a court did not mean it concerned or required determination of an article 6 civil right. What mattered was the nature of the issue in dispute and the nature of the decision under challenge, not the forum in which the challenge was pursued: see the judgment at paragraph 138 and 139.

18. The Claimants make four submissions seeking to avoid the application of these conclusions to the present case. The first, third and fourth points made are all to the effect that this case is distinguishable because of the May 2021 ARAP decision. The only reason, it is said, that the First Claimant was eligible to make an application under paragraph 276BA1 of the Immigration Rules was that he was eligible under the ARAP by reason of his former employment as an interpreter for British armed forces. This is not a material matter. It does not change the nature of the decisions made by the Secretary of State in November 2021, decisions on whether to grant the First Claimant and his family permission to enter the United Kingdom. The remaining, second, submission made by the Claimants is that the conclusion in *Maaouia* that article 6 did not apply, depended on the conclusion that article 1 of Protocol 7 to the ECHR did not apply. The material part of the Court's reasoning is at paragraphs 36 and 37 of the judgment:

> "36. The Court points out that the provisions of the Convention must be constructed in line with the entire Convention system including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contained procedural guarantees applicable to expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention …". Taken together, those provisions show that States were aware of Article 6(1) did not apply to

> procedures for the expulsion of aliens and wished to take special measures in that sphere …
>
> 37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6(1) of the Convention."

19. This does not support the conclusion that Article 6 applies in the present case. In *Maaouia* the Court referred to article 1 of Protocol 7 as an aid to interpretation of article 6 ECHR. However, its conclusion on the scope of article 6 is clear. Decisions of the type identified at paragraph 40 of the judgment (and also referred to at paragraph 35 of the judgment) are not decisions on civil obligations and therefore are not within the scope of article 6. The Court did not conclude that only matters within article 1 of Protocol 7 were outside the reach of article 6.

20. Since I have accepted the Secretary of State's submission on the scope of article 6 civil rights and obligations and the effect of the judgment in *Maaouia*, it is not necessary for me to determine either the Secretary of State's submission on article 1 jurisdiction, or her alternative submission (based on the judgment of the Court of Appeal in *R(Reprieve) v Prime Minister* [2022] 2 WLR 1) that disclosure of the sort identified in *AF (No.3)* is not required because the present case does not concern application of a coercive measure.

(2) Ground (4). Secretary of State's assessment of the not conducive to the public good issue was flawed as it did not rest on sufficient/rational enquiry, and/or consideration of only relevant matters, and/or was irrational

21. Of necessity, the Claimants' submission on this ground rests on the open material. The First Claimant made two witness statements in support of his challenge to the Secretary of State's first decision made in July 2021 refusing his application under the Immigration Rules. Those statements were made on 27 August 2021 and 26 September 2021. Both pre-date the decision now under challenge and were available to the Secretary of State when she took her second decision on the First Claimant's application. The information in those statements is to the following effect.

22. Sometime before he worked for British armed forces, the First Claimant worked for the US armed forces, first as a perimeter guard, and then as a supervisor of perimeter guards. The First Claimant then trained as an interpreter. During this time, he became aware he had been placed on a US "watchlist". He was questioned about two relatives, X and Y. The First Claimant's evidence is that when questioned he said he knew that X was connected to the Taliban but also that he also that he had provided 'intelligence' about the Taliban to the US forces. The First Claimant said he had had only limited contact with him. X is now dead. The First Claimant's evidence is that he also said he had been told by his mother that Y was linked to the Taliban. The First Claimant also says that for several years he had been "afraid of Y's connections to the Taliban". In the witness statements the First Claimant says that Y lived in the same village as his parents and that until 2020, he would see Y infrequently, perhaps monthly or every few

months. When questioned in October 2009, he said that "over the past few months" Y had phoned him three or four times. The First Claimant did not want to speak to him but did so as a matter of respect. The First Claimant was also worried that if he ignored Y there could be "reprisals from the Taliban".

23. The First Claimant's evidence is that he believes he was placed on the US watchlist because of these family connections, and that he was later told he had been removed from the watchlist. He says that at that time he applied to be re-employed by the US armed forces, took a polygraph test, and "passed". The First Claimant also refers to a letter (exhibited to his statement) from the UK armed forces which confirmed he had been removed from the US watchlist around that time.

24. The First Claimant also referred to other matters which, he contended, show he is not linked to the Taliban. These matters were the subject of evidence in the open part of the hearing. However, to avoid risking identification of the Claimant, the matters relied on are set out only in the closed version of this judgment.

25. Further, the First Claimant relies on two letters of support from members of the US army; one is from a Lieutenant-Colonel in the United States Army. The other is from a Major in the US army who describes an occasion when the Claimant reported an IED at a location where coalition forces travelled; he states that the First Claimant's actions "contributed to savings lives of coalition Forces".

26. The Secretary of State had this information before her when the decision was taken. She also had sight of various closed evidence which has been disclosed in these proceedings.

27. The First Claimant's application was covered by the Secretary of State's policy "Suitability: non-conducive grounds for refusal or cancellation of entry clearance or permission" ("the Secretary of State's policy"). Version 2 of that policy was published on 10 November 2021, the same day as the second decision letters in this case. The Claimants' applications were considered on the basis of the previous version of the policy, but it is agreed that the earlier version of the policy is, in material part, identical to the November 2021 version.

28. The material part of the Secretary of State's policy states as follows, by way of introduction:

> "Non-conducive to the public good means that it is undesirable to admit the person to the UK, based on their character, conduct, or associations because they pose a threat to UK society. This applies to conduct both in the UK and overseas.
>
> The test is intentionally broad in nature so that it can be applied proportionately on a case-by-case basis, depending on the nature of the behaviour and circumstances of the individual. What may be appropriate action in one scenario may not be appropriate in another. All decisions must be reasonable, proportionate and evidence based.

You must be able to show on a balance of probabilities that a decision to refuse is based on sufficiently reliable information. You must consider each case on its individual merits.

Allegations, unsubstantiated and vague generalisations are not sufficient. However, intelligence given by UK law enforcement agencies or relevant and reliable open-source information may give sufficient grounds for your refusal."

The detail of the policy is then set out

"**When is a person's presence in the UK not conducive to the public good?**

Many types of offending or reprehensible behaviour can mean that an individual's presence in the UK would not be conducive to the public good, and many factors will weigh into this such as:

- the nature and seriousness of the behaviour
- the level of difficulty we could experience in the UK as a result of admitting the person with that behaviour
- the frequency of the behaviour
- the other relevant circumstances pertaining to that individual

Other examples of situations where a person's presence may be non-conducive to the public good include the following:

- the person is a threat to national security, including involvement in terrorism and membership of proscribed organisations
- the person has engaged in extremism or other unacceptable behaviour
- the person has committed serious criminality
- the person is associated with individuals involved in terrorism, extremism, war crimes or criminality

...

This list is not exhaustive. In all cases, you must consider what threat the person poses to the UK public. You should balance factors in the individual's favour against negative factors to reach a reasonable and proportionate decision.

Threat to national security

National security threats will often be linked to terrorism. Terrorist activities are any act committed, or the threat of action designed to

influence a government or intimidate the public, and made for the purposes of advancing a political, religious or ideological cause and that:

- involves serious violence against a person
- may endanger another person's life
- creates a serious risk to the health or safety of the public
- involves serious damage to property
- is designed to seriously disrupt or interfere with an electronic system

Extremism and unacceptable behaviour

In October 2015 the government published its Counter-Extremism Strategy, which contains a commitment to make it more explicit that unacceptable behaviour includes past or current extremist activity, either in the UK or overseas. Where a person has previously engaged in unacceptable behaviour you must consider if they have since publicly retracted those views and have not re-engaged in such behaviour.

Unacceptable behaviour covers any non-UK national whether in the UK or abroad who uses any means or medium including:

- writing, producing, publishing or distributing material
- public speaking including preaching
- running a website
- using a position of responsibility such as a teacher, community or youth leader

to express views which:

- incite, 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
- foster hatred which might lead to inter-community violence in the UK

The list of unacceptable behaviours is indicative rather than exhaustive.

Association with individuals involved in terrorism, extremism, or war crimes

> A person may be associated with or have associated with persons involved in terrorism, extremism or war crimes. The association link will need careful consideration, particularly where it concerns a family member. Family association with war criminals must be disregarded in the case of minors.
>
> You must consider the following questions:
>
> - Is there evidence to suggest the person's association with the individual was not of their own free will? - this is particularly relevant for family associations
>
> - Is there evidence to suggest the person associated with the individual whilst unaware of their background and activities?
>
> - If so, what action did the person take once the background and nature of the individual came to light?
>
> - Are there any suggestions that the person's association signals their implicit approval of the views and nature of the individual's illegal activities?
>
> - How long has this association lasted? - the longer the association, the more likely it may be that the person is aware of or accepts the activities and views
>
> - How long ago did such association take place?
>
> If there is evidence that an associate or family member does not accept, tolerate or support the views or activities of a person involved in war crimes, or where they have clearly distanced themselves from those activities, their association alone will not be a reason to refuse on non-conducive grounds."

29. The November 2021 decision on the First Claimant's application was taken by the Security Minister, a Minister of State at the Home Office. A submission was prepared for him for that purpose. Since there is no evidence that directly explains the matters relied on when refusing the application, I have assumed that the decision was taken for the reasons set out in the ministerial submission.

30. I took into consideration the further statement by Claire Earl (a senior Home Office official) and the documents exhibited to it. That statement was filed by the Secretary of State after the hearing. I granted the Secretary of State's application to admit that evidence, notwithstanding that it was provided late, because I did not consider that admitting the statement would be to the prejudice of the Claimants, and because the new evidence assisted me to understand the steps taken for the purpose of taking the November 2021 decisions

31. On consideration of both the open and the closed evidence, my conclusion is that the Claimants succeed on Ground 4. For the reasons given in the closed part of this judgment I am satisfied that the steps taken by the Secretary of State were not sufficient to discharge the *Tameside* obligation (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014) to take reasonable steps with a view to ensuring the factual basis for her decision was sufficient. The principle in *Tameside* sets a high bar for any claimant. The obligation on a decision-maker to ensure that a decision is the product of reasonable inquiry is an aspect of rationality; it is not an obligation to make exhaustive inquiry before taking a decision; and when assessing compliance with the requirement it is not for the court to stand in the shoes of the decision-maker. A claimant relying on the *Tameside* principle will succeed only when the failure is both obvious and material.

32. There is one other point on evidence. In the open part of the hearing I heard submissions on the Claimants' application (made on 26 April 2022) to admit a report prepared by Sara de Jong (a Senior Lecturer at the University of York) and Simon Diggins OBE (formerly a Colonel in the British Army whose experience included working as Defence Attaché at the British Embassy in Kabul between 2008 and 2010). The report was described as expert evidence. The Secretary of State opposed the application. For the purposes of reaching my conclusions in this judgment I have not needed to have regard to the information in this document. However, I have decided to allow the Claimants' application to admit the document. It is a lengthy document which, for the most part, provides an overview of the role played by locally employed interpreters and gives some sense of how Afghan citizens might interact with Taliban fighters, in the context of what was effectively a form of civil war within Afghanistan. For example, the report contains information explaining ordinary familial relationships and how those relationships were or were not affected when members within an extended family were associated with opposing factions. I doubt if much of the contents of this document is expert opinion in the true sense of the term. In large part the document collates open-source material, which is then supplemented by the authors' direct experience of the day-to-day situation in Afghanistan prior to the withdrawal of the United States, United Kingdom and other United Nations forces in 2021. For the purposes of considering the matters in dispute in this case, the information in the report provided some assistance of matters relevant to context. Admitting this document caused no prejudice to the Secretary of State.

(3) Ground (1) Failure to give reasons. Ground (3) No "minded to" process

33. There is no general duty to give reasons. However, it is the Secretary of State's general practice to give reasons when taking decisions under the Immigration Rules. For the purposes of this ground of challenge I am prepared to assume that decisions on the applications under the Immigration Rules should, by reason of fairness, be supported by reasons.

34. In this case the focus is on the reasons given for the decision refusing the First Claimant's application. The decisions on the applications made by the other Claimants were all to the effect that they were applications contingent on the First Claimant's application and failed because his application had failed. No point is, or could, be taken on the content on those decision letters.

35. The reasons given for refusing the First Claimant's application are at paragraph 8 above. In substance they explain that the application was refused for the "not conducive to the public good" reason at paragraph 9.3.1 in Part 9 of the Immigration Rules. Reference is also made to paragraph 276BC1 of the Immigration Rules which cross-refers to Part 9. In this way, the First Claimant understood the premise for the decision, but not the particulars relied on.

36. The Secretary of State's first submission is that this ground of challenge is not about a failure to give reasons – a reason was given by reference to paragraph 9.3.1 of the Immigration Rules – but instead it is a complaint about not giving reasons for that reason. I do not accept this submission. There will be cases where the substance of the complaint does come to the contention that insufficient reasons were given but this is not that case. The reason the Secretary of State gave was a generic reason; it did not indicate how the "not conducive to the public good" reason applied to the First Claimant when, ordinarily, at least in my experience, reasons given by the Secretary of State for decisions under paragraph 9.3.1 of the Immigration Rules would make some attempt to set out the matters that were most material to the decision.

37. The Secretary of State's second submission relies on the decision in *Kamoka v The Security Services* [2015] EWHC 3307 (QB) for the proposition that "the common law only requires disclosure of reasons and information in so far as consistent with the provisions of the [Justice and Security Act 2013]". I do not consider that judgment is really on point. It concerned disclosure in proceedings subject to a closed material procedure under the 2013 Act when the defendant to the proceedings made an application to strike out the claim. Could the application proceed only if "ordinary" disclosure had been given? Irwin J's conclusion (at paragraph 20) was as follows:

> "My conclusion therefore under the 2013 Act is firstly, that common law must introduce fairness as far as possible and so as is consistent with the provision of the Act. It cannot mean common law imports a requirement to disclose an irreducible minimum of information, even if that were to be incursion on the protections in the Act. I am certain that the common law does mean that the process of disclosure should reveal to the claimants as much as possible, consistent with the provisions of the statute. Again, common law means that, where material cannot be revealed in full, it should be summarised as fully as possible consistent with the statute. Beyond that, the common law cannot go."

38. That conclusion does not directly address the issue in this case which concerns the common law requirements for fair decision making. At the stage a decision is taken, at the point when the duty to give reasons will arise, the 2013 Act does not apply. That Act cannot therefore dictate the conclusion in this case.

39. Nevertheless, I reject this part of the Claimants' case. To the extent that common law fairness requires a decision-maker to give reasons for her decision, that reflects a public policy that reasoned decisions are likely to be more robust that unreasoned ones; and that giving reasons for decisions to those affected by them enables decisions to be better

understood, and if necessary, be the subject of considered challenge. Those policy objectives are important, but they are not absolute and can yield to the extent necessitated by competing and overriding considerations.

40. In this case, such considerations that necessitated that the Secretary of State's explanation of why the "not conducive to the public good" reason applied to the First Claimant remain confidential, did exist. That is evidenced by the subsequent conclusion that the proceedings should be conducted using a closed material procedure, and that within that procedure the Secretary of State's explanation for her conclusion that paragraph 9.3.1 of the Immigration Rules applied to the First Claimant should be disclosed only to Special Advocates.

41. For these reasons, and on the assumption made at paragraph 33, the failure to give reasons beyond the bare reference to the "not conducive to public good reason" was not unlawful. Ground 1 fails.

42. There is a clear link between Ground 3 and Ground 1. There is no statutory requirement for a "minded to" process. The question is what does the common law require in this case? A legal requirement for a decision-maker to give notice of a proposed decision to permit the person who would be affected to make representations that the proposed decision should not be made, presupposes that an opportunity to make representations would be an effective opportunity – i.e., the person would have the chance to understand the reason for the proposed decision and make representations that engaged with those reasons. The Claimants rely on the judgment of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700. However, that decision does not make good the submission that the Claimants make in this case. On the facts before it in *Bank Mellat*, the Supreme Court (per Lord Sumption at paragraphs 28-37) concluded that prior notice of an order imposing sanctions pursuant to the provision of the Counter-Terrorism Act 2008 should have been given. Nevertheless, the Court accepted that this was not the consequence of any common law rule, and that no such obligation could arise it if would require disclosure (whether implicit or explicit) of secret intelligence material (see the judgment at paragraph 31).

43. On its facts, this case is not governed by the conclusion reached in *Bank Mellat*. Rather, the reasoning in that case supports the Secretary of State's submission. The nature of the evidence that weighed against the First Claimant's application could not be disclosed to him since to do so would have risked damage to the interests of national security. Thus, this ground of challenge fails, for essentially the same reasons as Ground 1.

C. Conclusion and Disposal

44. This case came before me as a rolled-up hearing. For the reasons set out above I grant permission to apply for judicial review on the Grounds I have considered in this judgment (i.e., Grounds 1 to 4). The claim for judicial review succeeds on Ground 4, but fails on Grounds 1, 2 and 3. The appropriate relief is to remit the Claimants' applications under the Immigration Rules to the Secretary of State for further consideration.