Neutral Citation Number: [2016] EWHC 1898 (Admin)

Case No: CO/5472/2014
CO/6255/2015

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

Royal Courts of Justice, Strand
London, WC2A 2LL
Date: 28/07/2016

Before:
LORD JUSTICE HAMBLEN
MR JUSTICE CRANSTON

Between:

THE QUEEN

On the application of

(1) XH
(2) AI

Claimants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Hugh Southey QC and Barnabas Lams (instructed by Arani and Co) for **XH**
Daniel Beard QC, Nikolaus Grubeck and Jack R. Williams (instructed by Hickman & Rose) for **AI**
James Eadie QC and David Blundell (instructed by **Government Legal Department**) for **Secretary of State for the Home Department**
Mr Ashley Underwood QC and Bilal Rawat (instructed by the Special Advocates' Support Office) as **Special Advocates for XH**
Hearing dates: 7 and 8 July 2016

Judgment Approved by the court for handing down

Lord Justice Hamblen:

Introduction

1. This is the judgment of the Court.

2. This case concerns the power of the Secretary of State for the Home Department ("the Secretary of State") to cancel or withdraw passports under the Royal Prerogative from persons suspected of involvement in terrorism related activities.

3. The claimants, XH and AI, contend that the Secretary of State no longer has such a power or, if she does, that it was not lawfully exercised.

4. XH's challenge was listed as a rolled up hearing at the outset of which we determined that permission should be given on all grounds. Those grounds are:

   (1) Breach of EU law because of insufficient procedural safeguards, insufficient justification and no advance consultation;
   (2) Breach of Article 6 ECHR;
   (3) Breach of Article 8 ECHR;
   (4) Insufficient justification in domestic law;
   (5) Wrongful use of the Royal Prerogative to cancel the Claimant's passport instead of using powers under the Terrorism Prevention and Investigation Measures Act 2011 (the "TPIM Act"); and
   (6) Unfairness and breach of Article 6 ECHR, EU law and common law because there is insufficient protection of legal professional privilege ("LPP").

5. By order of Cranston J dated 21 June 2016, AI was permitted to advance his first two grounds of claim at the hearing. AI's ground 1 mirrors ground (5) above. AI's ground 2 is that the Secretary of State's decision is a breach of AI's fundamental rights because the decisions in his case were not in accordance with the law or the principle of legal certainty – ground (7).

Factual background

XH

6. XH is a British national whose passport was cancelled on 29 April 2014 for the reasons contained in a letter of that date which stated as follows:

> "This letter is to inform you that the above passport has been cancelled and you are no longer permitted to use this document to travel to and from the United Kingdom.
>
> There is no entitlement to a passport. The decision to issue, withdraw or refuse to issue a British passport is a matter for the Secretary of State for the Home Department (the Home Secretary). The Home Secretary considers that it is not in the public interest that you should hold a passport.
>
> You are a British National who is involved in terrorism-related activity. It is assessed that you are likely to travel overseas in the future in order to engage in further terrorism-related activity. It is assessed that these activities are so undesirable that the grant or continued enjoyment of passport facilities is believed to be contrary to the public interest.
>
> The passport remains the property of the Crown and will be retained. Her Majesty's Passport Office requests that you return the passport to the police officer delivering this letter.
>
> It is open to you to apply for a passport at a later date. The issue of a passport will be determined on the circumstances at the time of any application. If you require any further information, please contact Her Majesty's Passport Office, quoting the above reference number."

7. On 13 November 2014, XH was convicted of a series of criminal offences involving robbery, attempted robbery and possession of a bladed article. On 19 November 2014, he was sentenced to a term of imprisonment of 5 years and 6 months.

8. On 26 November 2014, XH commenced the present proceedings.

9. Additional reasons for the cancellation of his passport were provided in a further decision-letter of 16 February 2015 which stated as follows:

> "You are a British national involved in terrorism-related activity. It is assessed that you are an Islamist extremist. It is assessed that prior to the exercise of the Royal Prerogative you have been in possession of media concerning anti-American and Israeli propaganda and video clips in support of jihad and violence. It is assessed that prior to the exercise of the Royal Prerogative you may have maintained contact with associates assessed to be located in Syria where they were engaged in Islamist extremist activities. It is assessed that prior to the exercise of the Royal Prerogative you were likely to travel overseas in the future in order to engage in further terrorism-

related activity. It is assessed that these activities overseas would present a risk to the national security of the United Kingdom."

10. On 27 February 2015, XH filed his first set of Amended Grounds.

11. On 13 May 2015, the Secretary of State applied for a declaration pursuant to section 6 of the Justice and Security Act 2013 (the "JSA 2013"). For the reasons set out in a judgment delivered on 21 October 2015, the Divisional Court (Burnett LJ and Cranston J) granted the section 6 declaration: [2015] EWHC 2932 (Admin). XH's application for permission to appeal was dismissed by the High Court on 20 November 2015, and by the Court of Appeal on 28 January 2016. A separate application for permission to appeal from the Special Advocates was also dismissed by the Court of Appeal on 28 January 2016.

12. Following meetings between the Special Advocates and counsel for the Secretary of State, the Secretary of State provided further reasons, and some disclosure, to XH in a letter dated 3 May 2016 which stated as follows:

"The Secretary of State was invited to exercise the Royal Prerogative to cancel the Claimant's British passport on the grounds that his activities are undesirable for reasons of national security.
She was provided with a written submission and supporting material which recommended that she agree that the public interest criteria for exercising the prerogative are met and that the passport should be cancelled, and that she should sign an authority for the passport to be retrieved from the Claimant. What follows is a summary of that submission;
The Claimant is a British citizen, born in London in 1990 and currently residing there. He has a criminal record dating back to 2009, which includes offences such as theft and violence against a police officer. He is believed to be currently involved in criminal activity including dealing in stolen property and student loan fraud;
The Claimant is an Islamist extremist. He may have maintained contact with associates assessed to be located in Syria where they are engaged in Islamist extremist activities, including fighting; he has repeatedly expressed a desire to travel overseas to participate in Islamist extremist activities; and he has been involved in activities in tangible and practical support of Syria-based Islamist extremist associates;
The Home Secretary's written ministerial statement of 25 April 2013 sets out the criteria for exercising the Royal Prerogative on public interest grounds, and provided that passport facilities may be refused or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example engage in terrorism-related activity or other serious or organised criminal activity;
The detail set out in the submission shows that the Claimant is intending to travel overseas to engage in terrorist related activity, likely to be related to Syria. His past, present and proposed activities if he should travel to Syria support the view that it would be contrary to the public interest for him to hold a British passport. The risk

posed by the Claimant is assessed to be better managed if he were unable to travel overseas to Syria;
Removal of the passport is necessary and proportionate to the threat the Claimant poses; other disruptive measures have been considered and rejected;
Although there may be arrest opportunities, they are uncertain and it would not necessarily be the case that the Claimant would be required to surrender his passport as a condition of bail;
There is no reason to believe that the Claimant has family overseas or any legitimate overseas travel plans;
If there are compelling circumstances requiring the Claimant to travel within the EU and if the risk to national security could be adequately managed, it may be possible to consider issuing a single-use travel document;
If following a decision to exercise the Royal Prerogative, the Claimant applied for a passport or a temporary travel document, or requested reconsideration of the cancellation of his passport, the assessment will be reviewed and further advice provided to the Secretary of State;
There is written administrative guidance setting out the process by which the Secretary of State is invited to exercise her power under the Royal Prerogative to cancel a British passport on the grounds of national security. That process was followed in the case of this Claimant;
The Secretary of State's case against the Claimant is not based on his previous travel overseas."

13. A two day hearing had been fixed for the hearing of an application for subsequent orders to the section 6 declaration. This was, however, vacated by consent following agreement by the Special Advocates that no further disclosure issues under Case C-300/11 *ZZ (France) v. Secretary of State for the Home Department* [2013] QB 1136 arose between the parties.

14. On 3 June 2016, XH served his second set of Amended Grounds of Claim. On 20 June 2016, he provided a witness statement to accompany his claim.

AI

15. AI is a British national of Iraqi Kurdish background. He is 18 years old. At the time of the decisions under challenge, he was 17 years old.

16. On or around 26 March 2014, AI's elder brother, Mohammed, left the United Kingdom and travelled to Syria. He is currently located in Iraq and is fighting with the terrorist group Islamic State.

17. On 4 November 2014, West Midlands Police searched AI's home. During the search, they seized his passport, which had been held at a relative's house, and mobile telephone. On 21 April 2015, AI was arrested on suspicion of planning to travel to Syria and interviewed under caution. It was subsequently decided that no further action would be taken against him.

18. On 26 June 2015, the Secretary of State cancelled AI's passport for the reasons set out in a letter of that date which stated as follows:

> "There is no entitlement to a passport. The decision to issue, withdraw or refuse to issue a British passport is a matter for the Secretary of State for the Home Department (the Home Secretary). The Home Secretary considers that it is not in the public interest that you should hold a passport.
>
> You are a British national who is assessed to be supportive of the actions and ideology of the terrorist organisation known as Islamic State (also known as IS, ISIL and ISIS). It is assessed that you aspire to travel to Syria or Iraq in the future to engage in, and provide support for, terrorism-related activity on behalf of the Islamic State. It is assessed that these activities in Syria or Iraq would present a risk to the national security of the United Kingdom. You are therefore considered a person whose past, present or proposed activities, actual or suspected, are so undesirable that the grant or continued enjoyment of passport facilities is believed to be contrary to the public interest.
>
> The passport remains the property of the Crown and will be retained.
>
> It is open to you to apply for a passport at a later date. The issue of a passport will be determined on the circumstances at the time of any application. If you require any further information, please contact Her Majesty's Passport Office, quoting the above reference number."

19. On 10 July 2015, AI's representatives sent a pre-action protocol letter to Secretary of State. The Secretary of State reviewed the decision of 26 June 2015 and, on 10 September, wrote confirming the decision to cancel AI's passport. So far as is relevant, that letter stated as follows:

> "You are a British national who is assessed to have an extremist mind-set and who has published via social media a body of Islamist extremist material. You are assessed to be supportive of the actions and ideology of the terrorist organization known as the Islamic State (also known as IS, ISIL and ISIS). Your brother, Mohammed …, is currently located in Iraq, fighting with ISIL and has encouraged you to travel to ISIL controlled territory. It is therefore assessed that you aspire to travel to Syria or Iraq in the future in order to engage in, and provide support for, terrorism-related activity likely on behalf of ISIL. It is assessed that these activities in Syria or Iraq would present a risk to the national security of the United Kingdom."

20. On 9 October 2015, the Secretary of State responded to AI's pre-action protocol letter. The present claim was commenced on 9 December 2015 challenging the 10 September 2015 decision.

21. On 1 February 2016, Langstaff J granted permission. On 22 March 2016, Foskett J made a declaration under section 6 JSA 2013.

22. On 22 May 2016, AI was arrested and charged with an offence under section 38B of the Terrorism Act 2000 (the "TA 2000") for failing to disclose information relating to another individual's plans to travel to Syria or Iraq to join ISIS. He has been remanded in custody and is presently in HMP Wandsworth.

Legal background

The Royal Prerogative

23. The grant or withdrawal of a passport has always been an exercise of the Royal Prerogative. As stated by O'Connor LJ in *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 QB 811 at p817C-D:

> "…there is no doubt that passports are issued under the Royal Prerogative in the discretion of the Secretary of State".

24. Successive Governments have set out the policy on the exercise of that power in Ministerial Statements. In summary:

(1) The exercise of the prerogative power and the possibility of withholding a passport were first discussed in Parliament in 1955. On 1 November 1955, the Marquess of Reading, the then Minister for Foreign Affairs, stated:

> "The grant of United Kingdom passports is a Royal prerogative exercised through Her Majesty's Ministers and in particular the Foreign Secretary. No United Kingdom citizen has a legal right to a passport and in theory the Foreign Secretary has the power to withhold or withdraw a passport at his discretion, although in practice such power is exercised only in exceptional cases".

(2) In response to a question by Viscount Stansgate in 1958, the Earl of Gosford described the policy as follows:

> "The Foreign Secretary has the power to withhold or withdraw a passport at his discretion, although in practice such power is exercised only very rarely

and in very exceptional cases. First, in the case of minors suspected of being taken illegally out of the jurisdiction; secondly, persons believed on good evidence to be fleeing the country to avoid prosecution for a criminal offence; thirdly, persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom; and fourthly, persons who have been repatriated to the United Kingdom at public expense and have not repaid the expenditure incurred on their behalf."

(3) The policy has been restated and amended on a number of occasions since 1958 - see, for example, Hansard, HC Deb, 15 November 1974, Vol 881, col 265W; HC Deb, 22 January 1981, Vol 997, cols 234-235W; and HL, 25 July 2002, col WA107.

(4) On 25 April 2013, the Secretary of State announced, in a Written Ministerial Statement ("WMS"), the latest version of the policy in relation to the exercise of the Royal Prerogative in the present context. This represents current policy and the policy in force at the time of the decisions in the Claimants' cases:

"There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.

This Written Ministerial Statement updates previous statements made to Parliament from time to time on the exercise of the Royal Prerogative and sets out the circumstances under which a passport can be issued, withdrawn, or refused. It redefines the public interest criteria to refuse or withdraw a passport.

A decision to refuse or withdraw a passport must be necessary and proportionate. The decision to withdraw or refuse a passport and the reason for that decision will be conveyed to the applicant or passport holder. The disclosure of information used to determine such a decision will be subject to the individual circumstances of the case.

The decision to refuse or to withdraw a passport under the public interest criteria will be used only sparingly. The exercise of this criteria will be subject to careful consideration of a person's past, present or proposed activities.

For example, passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organised criminal activity.

This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes

has become increasingly apparent with developments in various parts of the world

Operational responsibility for the application of the criteria for issuance or refusal is a matter for the Identity and Passport Service (IPS) (now HM Passport Office) acting on behalf of the Home Secretary. The criteria under which IPS (now HM Passport Office) can issue, withdraw or refuse a passport is set out below.

Passports are issued when the Home Secretary is satisfied as to:

i. the identity of an applicant; and
ii. the British nationality of applicants, in accordance with relevant nationality legislation; and
iii. there being no other reasons—as set out below—for refusing a passport. IPS may make any checks necessary to ensure that the applicant is entitled to a British passport.

A passport application may be refused or an existing passport may be withdrawn. These are the persons who may be refused a British passport or who may have their existing passport withdrawn:

i. a minor whose journey was known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence or care order had been made or who had been awarded custody; or care and control; or
ii. a person for whose arrest a warrant had been issued in the United Kingdom, or
iii. a person who was wanted by the United Kingdom police on suspicion of a serious crime; or a person who is the subject of:

- a court order, made by a court in the United Kingdom, or any other order made pursuant to a statutory power, which imposes travel restrictions or restrictions on the possession of a valid United Kingdom passport; or
- bail conditions, imposed by a police officer or a court in the United Kingdom, which include travel restrictions or restrictions on the possession of a valid United Kingdom passport; or
- an order issued by the European Union or the United Nations which prevents a person travelling or entering a country other than the country in which they hold citizenship; or
- a declaration made under section 15 of the Mental Capacity Act 2005.

iv. A person may be prevented from benefitting from the possession of a passport if the Home Secretary is satisfied that it is in the public interest to do so. This may be the case where:

- a person has been repatriated from abroad at public expense and their debt has not yet been repaid. This is because the passport fee supports the provision of consular services for British citizens overseas; or
- a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest.

• There may be circumstances in which the application of legislative powers is not appropriate to the individual applicant but there is a need to restrict the ability of a person to travel abroad.

The application of discretion by the Home Secretary will primarily focus on preventing overseas travel. There may be cases in which the Home Secretary believes that the past, present or proposed activities—actual or suspected—of the applicant or passport holder should prevent their enjoyment of a passport facility whether overseas travel was or was not a critical factor."

25. The WMS accordingly makes it clear that the decision to refuse or withdraw a passport "must be necessary and proportionate"; that it will be used "only sparingly"; and that the exercise of the redefined "public interest criteria" will be "subject to careful consideration of a person's past, present or proposed activities". Examples are given of circumstances in which such a decision may be made in relation to involvement in terrorist related activity. Such involvement would fall within the "public interest criteria" of "a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest". It was these criteria which were relied upon in the case of XH and AI.

26. The decision of the Secretary of State to refuse or withdraw a passport is amenable to judicial review – see the *ex parte Everett* case.

Relevant legislative provisions

27. The TPIM Act came into force on 14 December 2011. It was recently amended, in certain respects, by the Counter-Terrorism and Security Act 2015 (the "2015 Act"). Section 2 of the TPIM Act makes provision for terrorism prevention and investigation measures ("TPIMs") and provides that:

"(1) The Secretary of State may by notice (a "TPIM notice") impose specified terrorism prevention and investigation measures on an individual if conditions A to E in section 3 are met.
(2) In this Act "terrorism prevention and investigation measures" means requirements, restrictions and other provision which may be made in relation to an individual by virtue of Schedule 1 (terrorism prevention and investigation measures).
(3) In this section and Part 1 of Schedule 1 "specified" means specified in the TPIM notice."

28. Section 3 sets out the conditions for the imposition of such measures:

"(1) Condition A is that the Secretary of State is satisfied, on the balance of probabilities, that the individual is, or has been, involved in terrorism-related activity (the "relevant activity").
(2) Condition B is that some or all of the relevant activity is new terrorism-related activity.
(3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.
(4) Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual.
(5) Condition E is that –

(a) the court gives the Secretary of State permission under section 6, or

(b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.

(6) In this section "new terrorism-related activity" means –

(a) if no TPIM notice relating to the individual has ever been in force, terrorism-related activity occurring at any time (whether before or after the coming into force of this Act);

(b) if only one TPIM notice relating to the individual has ever been in force, terrorism-related activity occurring after that notice came into force; or

(c) if two or more TPIM notices relating to the individual have been in force, terrorism-related activity occurring after such a notice came into force most recently."

29. "Terrorism-related activity" is defined in section 4 as follows:

"4. For the purposes of this Act, involvement in terrorism-related activity is any one or more of the following—

(a) the commission, preparation or instigation of acts of terrorism;

(b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;

(c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;

(d) conduct which gives support or assistance to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraph (a) ;

and for the purposes of this Act it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general.

(2) For the purposes of this Act, it is immaterial whether an individual's involvement in terrorism-related activity occurs before or after the coming into force of this Act."

30. The terms "act of terrorism" and "terrorism" are defined in section 30(1) as follows:

"act" and "conduct" include omissions and statements;
"act of terrorism" includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see section 1(5) of that Act);
…
"terrorism" has the same meaning as in the Terrorism Act 2000 (see section 1(1) to (4) of that Act);"

31. Section 1 of the Terrorism Act 2000 provides:

"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, racial 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) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied.

(4) In this section–

(a) "action" includes action outside the United Kingdom,
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d)"the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

32. Section 5 of the TPIM Act provides that a TPIM Notice comes into force on service or a later specified date. Such a notice is in force for one year: section 5(1). The Secretary of State may by notice extend a TPIM Notice for one year from the date when it would have otherwise expired: section 5(2). A TPIM Notice can only be extended if Conditions A, C and D are met and only on one occasion: section 5(3). Thus the maximum duration of a TPIM Notice is two years.

33. Schedule 1 to the TPIM Act sets out a wide range of measures that can be imposed by the Secretary of State in a TPIM Notice. These include: "Overnight residence measure"; "Travel measure"; "Exclusion measure"; "Movement directions measure"; "Financial services measure"; "Property measure"; "Weapons and explosives measure"; "Electronic communication device measure"; "Association measure"; "Work or studies measure"; "Reporting measure"; "Appointments measure"; "Photography measure" and "Monitoring measure".

34. In relation to a travel measure paragraph 2 of Schedule 1 provides as follows:

"(1) The Secretary of State may impose restrictions on the individual leaving a specified area or travelling outside that area.

(2) The specified area must be –

(a) the United Kingdom, or

(b) any area within the United Kingdom that includes the place where the individual will be living.

(3) The Secretary of State may, in particular, impose any of the following requirements-

(a) a requirement not to leave the specified area without the permission of the Secretary of State;

(b) a requirement to give notice to the Secretary of State before leaving that area;

(c) a requirement not to possess or otherwise control, or seek to obtain, any travel document without the permission of the Secretary of State;

(d) a requirement to surrender any travel document that is in the possession or control of the individual.

(4) "Travel document" means –

(a) the individual's passport, or

(b) any ticket or other document that permits the individual to make a journey by any means –

(i) from the specified area to a place outside that area, or

(ii) between places outside the specified area.

(5) "Passport" means any of the following –
(a) a United Kingdom passport (within the meaning of the Immigration Act 1971);
(b) a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom, or by or on behalf of an international organisation;
(c) a document that can be used (in some or all circumstances) instead of a passport."

35. Schedule 5 "confers powers of entry, search, seizure and retention on constables in connection with the imposition of measures on individuals".

36. Section 147 of the Anti-social Behaviour, Crime and Policing Act 2014 (the "2014 Act") gives effect to Schedule 8 of the 2014 Act. This sets out "Powers to seize invalid passports etc". Paragraph 3(2) (b) empowers a constable to seize an invalid passport where the Secretary of State "has cancelled the passport on the basis that the person to whom it was issued has or may have been, or will or may become, involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities".

The Issues

37. The issues raised by the various grounds will be addressed in the following order:

Issue 1 – Wrongful use of the Royal Prerogative to cancel the Claimant's passport instead of using powers under the TPIM Act (ground 5 – XH and AI);

Issue 2 - Breach of AI's fundamental rights because the decisions in his case were not in accordance with the law or the principle of legal certainty (ground (7) – AI);

Issue 3 - Breach of EU law because of insufficient procedural safeguards, insufficient justification and no advance consultation (ground 1 – XH);

Issue 4 - Breach of Article 6 ECHR (ground 2 – XH);

Issue 5 - Breach of Article 8 ECHR (ground 3 – XH);

Issue 6 - Insufficient justification in domestic law (ground 4 – XH);

Issue 7 - Unfairness and breach of Article 6 ECHR, EU law and common law because there is insufficient protection of legal professional privilege ("LPP") (ground 6 – XH).

***Issue 1* – Wrongful use of the Royal Prerogative to cancel the Claimant's passport instead of using powers under the TPIM Act (ground 5 – XH and AI).**

38. XH and AI contend that the TPIM Act is intended to be a comprehensive code that governs the civil powers that can be exercised to manage the risk posed by alleged terrorists, that it has displaced or curtailed the Royal Prerogative, and that the purported use of the Royal Prerogative to circumvent the TPIM Act is unlawful.

39. The leading case on the circumstances in which the Royal Prerogative will be treated as having been curtailed by statute is *Attorney-General v. De Keyser's Royal Hotel* [1920] AC 508. The judgments of the House of Lords in that case include the following statements:

> Per Lord Parmoor at p.575:
>
> "The constitutional principle is that when the power of the executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the executive no longer derives its authority from the Royal prerogative of the Crown but from Parliament, and that in exercising such authority the executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."
>
> Per Lord Dunedin at p.526:
>
> "If the whole ground of something which could be done by the prerogative is covered by statute, it is the statute that rules. On this point I think the observation of [Swinfen Eady MR] is unanswerable. He says: 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative."
>
> Per Lord Atkinson, at pp.539-540:
>
> "It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and

that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same – namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal prerogative may theretofore have been."

Per Lord Sumner at p.561:

"The Legislature, by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object."

40. In *R v SSHD, ex p Fire Brigades Union* [1995] 2 AC 513 Lord Browne-Wilkinson observed as follows at p552D:

"...it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute … The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. But under the principle in Attorney-General v. de Keyser's Royal Hotel Ltd. [1920] A.C. 508, if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory powers so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded."

41. XH and AI accept that in order to determine whether the Royal Prerogative power has been "pro tanto excluded" it is necessary to consider whether the TPIM Act has either expressly or by necessary implication limited and/or replaced the exercise of the prerogative power in respect of the withdrawal and cancellation of passports in terrorism cases – see, for example, Lawton LJ in *Laker Airways v Dept. of Trade* [1977] QB 643 at p728B-D.

42. As to what is meant by necessary implication in the statutory context, Lord Walker in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 22, [2003] 1 A.C. 563 explained as follows:

"45 It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord *Hutton in B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

43. It is not contended that the TPIM Act expressly abrogates the Royal Prerogative. It is, however, contended that it is necessarily to be implied that it has done so for the following reasons, in particular:

(1) In the TPIM Act Parliament made express provision regarding the circumstances in which the Secretary of State is entitled to remove or restrict an individual's access to travel documents, including UK passports, on national security grounds (including in relation to an individual's potential involvement in terrorism). The asserted basis for the existence and exercise of prerogative power to withdraw a passport is thus precisely the same as that covered by the statutory scheme under the TPIM Act.

(2) If the Royal Prerogative entitled the Secretary of State to revoke an individual's passport regardless this would render the relevant provisions of the TPIM Act otiose. Paragraphs 2(3) (c) and 2(3) (d) of the TPIM Act, in particular, would serve no purpose so far as they apply to a UK passport if a passport can just be withdrawn under the prerogative.

(3) The Secretary of State cannot rely on a purported Royal Prerogative power to implement the same measure as is specifically provided for by primary legislation while circumventing the statutory safeguards and oversight regime which Parliament has intentionally put in place. The TPIM Act sets out a detailed regime of safeguards and oversight, regulating the exercise of the powers to impose travel restrictions, such as, for example, (i) the five statutory conditions in section 3 of the TPIM Act, which include independent court involvement; and (ii) the fact that under section 5 of the TPIM Act the restriction to travel can only be for a limited period of time (one year extendable to a maximum of two years). If the Secretary of State could impose travel measures under the Royal Prerogative without having to apply any of the safeguards required under the TPIM Act, that would cut across the statutory scheme put in place by Parliament and again render the relevant provisions, particularly regarding safeguards and limitations, otiose.

(4) Parliament has not expressly preserved the powers exercisable by the prerogative such as it did, for example, in section 9 of the Emergency Powers (Defence) Act

1939 and section 33 Immigration Act 1971. The implication is clear: Parliament intended the TPIM Act to cover cases such as the present one, which had hitherto been dealt with under generic Royal Prerogative powers but under the TPIM Act were regulated under a specific statutory framework and procedure.

44. AI and XH place particular reliance upon the *Laker Airways* case. It is submitted that that case shows that it is impermissible to use the Royal Prerogative to undermine a statutory scheme. The *Laker Airways* case involved the purported use of the Royal Prerogative effectively to nullify a licence to operate a passenger service granted by the Civil Aviation Authority pursuant to the detailed legislative scheme of the Civil Aviation Act 1971. The question at issue was summarized by Roskill LJ as follows at p721G-H:

"When one looks at the Act of 1971 and its elaborate code in relation to licensing and the other matters entrusted to the Authority, can it be said that where the Authority, in pursuance of statutory powers expressly granted by Parliament, has granted to the plaintiffs a valuable commercial asset in the form of an air transport licence to operate a service from Stansted to New York (a licence which the Authority can be directed by the Secretary of State to revoke in circumstances falling within section 4 of the Act but not otherwise, and certainly not, as we have held, by the giving of the guidance already considered) a licence granted after a full and careful hearing before the Authority in the express expectation of the obtaining of reciprocal rights from the United States Government under the Bermuda Agreement, a prerogative power nevertheless survives in the Crown to nullify that licence by withdrawing the plaintiffs' designation under the Bermuda Agreement with its attendant advantages, the securing of which was one of the avowed purposes of the Authority when it granted the plaintiffs that licence?"

45. Roskill LJ answered that question as follows at p722F-H:

"I do not think that the Attorney-General's argument that the prerogative power and the power under the municipal law can march side by side, each operating in its own field, is right. The two powers are inextricably interwoven. Where a right to fly is granted by the Authority under the statute by the grant of an air transport licence which has not been lawfully revoked and cannot be lawfully revoked in the manner thus far contemplated by the Secretary of State, I do not see why we should hold that Parliament in 1971 must be taken to have intended that a prerogative power to achieve what is in effect the same result as lawful revocation would achieve, should have survived the passing of the statute unfettered so as to enable the Crown to achieve by what I have called the back door that which cannot lawfully be achieved by entry through the front. I think Parliament must be taken to have intended to fetter the prerogative of the Crown in this relevant respect. I would therefore dismiss this appeal."

46. The other judgments were to similar effect – see Lord Denning at p706, and Lawton LJ at p728. It is submitted that that case shows that it is impermissible to use the Royal Prerogative to undermine a statutory scheme and that this similarly applies to the detailed statutory scheme set out in the TPIM Act.

47. We do not consider that much assistance is to be derived from the consideration of other statutes in other contexts. What matters is Parliament's intention in enacting the TPIM Act.

48. In considering that issue there are a number of relevant contextual factors. In particular:

(1) It is well known and long established that the right to withhold and to withdraw UK passports is governed by the Royal Prerogative.

(2) This has been confirmed by Ministerial Statements which have set out the UK Government's policy from time to time in respect of the use of the Royal Prerogative power to withhold or to withdraw a passport.

(3) At the time of the TPIM Act the stated policy recognised that the power may be exercised in respect of "notoriously undesirable or dangerous activities". Terrorism related activities are such activities.

(4) There is a clear public benefit in the retention of a power under the Royal Prerogative to withhold or to withdraw a passport in connection with terrorism related activities.

(5) The purpose or at least a central purpose of the TPIM Act is to provide measures to protect the public from terrorism related activities.

49. That context strongly suggests that if Parliament intended to abrogate the Royal Prerogative power it would have done so expressly. On AI and XH's case Parliament was significantly curtailing an important power it had for the protection of the public in relation to terrorism related activities. It was doing so, moreover, in a statute that was intended to increase such protection.

50. The curtailment of powers which would be involved is illustrated by the time limited nature of TPIM Act measures. On XH and AI's case there would remain no power at all to refuse to issue or to withdraw a passport on national security grounds relating to terrorism activities where a TPIM has expired after two years, there is no new terrorism related activity but the threat from the original terrorism related activity remains the same.

51. As the Secretary of State submits, it would be surprising if Parliament had impliedly excluded well-established prerogative powers in this very important field of national security without any express indication that it was doing so.

52. It would also be surprising for it to have done so without defining and making clear exactly what the carve out from the Royal Prerogative power in relation to terrorism related activities was to be.

53. It is nevertheless possible for Parliament to have done so by necessary implication. An important factor in considering the issue of necessary implication is the nature and degree of the overlap between the Royal Prerogative power and the legislative provisions and scheme.

54. In relation to UK passports the Royal Prerogative power is much wider than the powers conferred under the TPIM Act in a number of important respects.

55. First, it is to be noted that the Secretary of State exercises the Royal Prerogative to refuse to issue or withhold passports for many reasons which do not relate to the actions of terrorist suspects.

56. The eligibility criteria provide that the Secretary of State may consider refusal or withdrawal of a passport on public interest grounds, including in relation to terrorism related activities and serious and organised crime activities; or where a person is subject to a court order, bail conditions, arrest warrant, or wanted in connection with a serious crime; or is vulnerable through age or mental health; or the person has outstanding repatriation debts. The public interest nature of the exercise of the Royal Prerogative in this field permeates all of these areas.

57. Secondly, the Royal Prerogative is concerned with the issue, refusal and withdrawal of passports. By contrast, the TPIM Act authorises the Secretary of State to impose specific requirements, including "a requirement not to possess or otherwise control, or seek to obtain", and "a requirement to surrender", a passport. Surrender is not the same as withdrawal. If an individual surrenders a passport pursuant to the Schedule 1 powers, its validity remains unaffected; the only means of invalidating it is by the use of the Royal Prerogative.

58. Even if, as XH and AI submit, a requirement to surrender a passport is equivalent to withdrawal of a passport, the fact remains that the TPIM Act does not address the issue or refusal of passports. There is no reference to the power to issue or refuse passports in the TPIM Act. Nor does it contain any indication of the considerations to be applied in the decision to refuse a passport equivalent or even similar to the policy in the WMS or its predecessor.

59. Nor is there anything in the function or purpose of the TPIM Act to indicate that Parliament intended it to deal with the issue or refusal of passports. The preamble described it as "An Act to abolish control orders and make provision for the imposition of terrorism prevention and investigation measures".

60. Thirdly, the TPIM Act is engaged in the limited circumstances it sets out, namely where the five statutory conditions are met, and even then only for a limited period of time (one year, extendable to a maximum of two years).

61. Whilst the Royal Prerogative power is wider than the TPIM Act powers in relation to UK passports, in relation to terrorism related activities the TPIM Act powers range far wider than the Royal Prerogative.

62. The powers conferred under the TPIM Act in relation to passports represent only a small part of the scheme of the TPIM Act and the majority of the powers conferred on the Secretary of State by the TPIM Act are unconnected with the possession of

passports. Restrictions capable of being imposed under the TPIM Act include, for example, overnight residence measures, movement direction measures, financial services measures and electronic communication measures.

63. Many of these powers are far more draconian than the Royal Prerogative power and it is well understandable that they be made subject to safeguards and oversight.

64. Focusing just on the powers under the TPIM Act relating to travel restrictions, these too are wider and more draconian than the Royal Prerogative power. They provide for a whole range of powers by which travel can be restricted, as a matter of fact and law and on threat of criminal sanction; and, in so far as they relate to travel documents, cover not only UK passports but also "any ticket or other document that permits the individual to make a journey by any means" and "a passport issued by or on behalf of the authorities of a country or territory outside the United Kingdom, or by or on behalf of an international organisation" or "a document that can be used (in some or all circumstances) instead of a passport".

65. There are therefore major differences between the intended and actual sphere of operation of the Royal Prerogative and the TPIM Act. There is very far from being a complete overlap. That strongly militates against the suggested implication, let alone necessary implication as a matter of logic.

66. XH and AI stress in particular that it cannot have been Parliament's intention to allow the statutory safeguards and oversight regime laid down in the TPIM Act to be ignored by the simple expedience of using the Royal Prerogative. Given the wide ranging and draconian nature of the measures available under the TPIM Act it is not surprising that such safeguards are in place. The likely reality is that the TPIM Act would never be used simply to implement a passport travel measure, although that is theoretically possible. Its most likely use would be to implement a suite of measures of which a passport travel measure might be one, among many. Equally, where TPIM measures are being implemented it is unlikely that the Royal Prerogative would be exercised at the same time. The practical operation of the TPIM regime and the Royal Prerogative are likely to remain distinct. As such, it is incorrect to assert that the continued existence of the Royal Prerogative would render provisions of the TPIM Act otiose.

67. For all these reasons we are in no doubt that it is not to be implied that Parliament intended to abrogate the Royal Prerogative power in relation to terrorism related activities when it enacted the TPIM Act.

68. If corroboration of that conclusion is required, it may be found in the fact that:

(1) Subsequent to the TPIM Act the WMS was laid before Parliament without any concern or issue being raised.

(2) Paragraph 3(2) (b) of the 2014 Act empowers a constable to seize an invalid passport where the Secretary of State "has cancelled the passport on the basis that the person to whom it was issued has or may have been, or will or may become, involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities". This is language which clearly reflects the WMS and assumes that there is a power to cancel a passport so as to invalidate it.

69. AI had an alternative argument that if the Royal Prerogative power does still exist then the Secretary of State's exercise of that power in AI's case was unlawful. We agree, however, with the Secretary of State that this would require consideration of the facts of AI's case and AI does not have permission to raise factual issues at this hearing.

Issue 2 **- Breach of AI's fundamental rights because the decisions in his case were not in accordance with the law or the principle of legal certainty (ground (7) – AI).**

70. AI contends that the Secretary of State's policy setting out her purported powers under the Royal Prerogative as contained in the WMS is insufficiently precise to meet the requirements of "lawfulness" under the common law, EU law, and the ECHR. This is because it fails to prescribe sufficiently clear and foreseeable conditions and procedures for when and how that power can be exercised. AI so contends for the following reasons:

(1) It gives no indication of the circumstances in which an individual's "past, present or proposed activities, actual or suspected", are believed by the Secretary of State to be so undesirable that the grant or continued enjoyment of passport facilities is "contrary to the public interest".

(2) It fails to set out in a form accessible to the public any indication of the procedure to be followed for identifying which individuals might have their passports withdrawn, how the decisions are made, and which procedural safeguards (if any) will apply in implementing and reviewing it.

(3) It sets no limit regarding the duration of the decision.

(4) It incorporates no system of review and/or indication of the basis on which any review should be undertaken.

(5) It involves no process of independent review outside the executive branch of government.

(6) It fails to set out in a form accessible to the public when it, rather than the TPIM Act, will be applied by the Secretary of State. In light of the existence of the TPIM Act, it provides no clarity or certainty as to the scope of any such discretion conferred on the competent authorities and the manner of its exercise; there

simply is no clear and settled practice (or understanding or accessible rule) as to how the Royal Prerogative and the TPIM Act interrelate or co-exist. This is entirely unsatisfactory in terms of the rule of law as individuals have no way of ascertaining unequivocally what their rights and obligations are: the citizen is properly entitled to expect a legislative Act to apply.

71. Assuming that there is a requirement of "lawfulness" as contended for by AI, we agree with the Secretary of State that the reasons relied upon do not establish that the WMS is unlawful. Addressing each of the numbered reasons in turn:

(1) The WMS gives a number of examples of persons whose activities are such that it is not in the public interest that they should continue to enjoy passport facilities. Notably, this includes persons seeking to travel abroad to engage in terrorism related activity. That is precisely the category into which AI falls, as was made clear to him by both decision letters.

(2) The Secretary of State takes decisions on the cancellation or revocation of passports on the basis of all the material available to her. The WMS makes clear that it is based on a "careful consideration of a person's past, present or proposed activities". The WMS provides sufficient information about the categories of case which will engage the prerogative power. In addition, following a recent CLOSED hearing in another challenge to the use of the Royal Prerogative in this field (*R (MR) v. Secretary of State for the Home Department* (CO/4783/2015), a gist of the factors from an internal guidance document to be considered when exercising the Royal Prerogative has been released to the Claimants in this case.

(3) A decision to cancel or revoke a passport is not time-limited. That is because the subject of such a decision may apply at any time for a passport or for a review of the decision in their case. Such an application will be determined on the facts at that time. This is made clear in the decision letters in these cases; and such a review took place in AI's case.

(4) For the same reason, there is no need for a system of review. A person whose passport has been revoked or cancelled can apply at any time for a new passport. In appropriate cases, the Secretary of State is prepared to review decisions taken to cancel or revoke a passport. That is precisely what happened, on request, in AI's case.

(5) There is no requirement in law for an independent review "outside the executive branch of government" and AI cites no authority in support of such a proposition. In any event, a decision to revoke or cancel a passport is subject to judicial review: see *ex parte Everett*. The present claim demonstrates that such claims can be brought.

(6) There is no need for a public statement of the circumstances in which prerogative, as opposed to statutory, powers will be used. The WMS states in terms that there are occasions on which other legislative options are not suitable.

Issue 3 **- Breach of EU law because of insufficient procedural safeguards, insufficient justification and no advance consultation (ground 1 – XH).**

72. Two issues arise:

(1) Whether EU law is engaged;

(2) If so, whether there was a breach of EU law in any of the respects alleged by XH.

(1) Whether EU law is engaged

73. XH submits that EU law is engaged because the denial of a passport is or will be a denial of his right to free movement protected by Article 3(2) of the Treaty of European Union ("TEU") and Article 21(1) of the Treaty on Functioning of the European Union ("TFEU"). Article 21(1) provides that:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give effect to them."

74. Recital 2 of Directive EC/2004/38 ('the Free Movement Directive') emphasises the importance of free movement by describing it as one of the fundamental freedoms of the internal market. Article 4(1) provides that there is a right to leave the territory of a member state. Article 4(2) makes it clear that exit should not be conditional on an exit visa or other equivalent formality and Article 4(3) imposes an obligation on Member States to issue passports "in accordance with their laws". Article 4(3) provides that:

> "Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality."

75. The general principles concerning a Member State's power to "restrict" the right to free movement are set out in Article 27 of the Free Movement Directive which provides that:

> "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct

of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
3. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

76. XH submits that these provisions demonstrate that the denial of a passport is a denial of a person's right of exit protected by the Free Movement Directive, in support of which the case of *Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* [2013] QB 423 at [31] is cited.

77. The Secretary of State accepts that, in principle, national measures likely to preclude or deter nationals of a Member State from leaving their state of origin and exercising their right to freedom of movement constitute an obstacle to that freedom and thus fall within the scope of EU law - see Case C-464/02 *Commission v. Denmark* [2006] 2 CMLR 14, at [35].

78. In XH's case, however, the Secretary of State submits that the use of the Royal Prerogative does not "preclude or deter" him from exercising his right of freedom of movement because:

(1) XH is imprisoned and so cannot exercise his right of freedom of movement. He has no prospect of being able to travel within the EU until the end of his sentence of criminal imprisonment. His reliance on EU law is, therefore, academic. It is the fact of his imprisonment which prevents his exercise of those rights at the present time, not the impugned decisions.
(2) He has produced no or no sufficient evidence of any wish to use his freedom of movement within the EU. It is submitted that his recently filed witness statement fails to do so. Nowhere in that statement does he allege, beyond a bare assertion, that he wishes, either at the moment despite his incarceration, or upon his release, to exercise his right of free movement.

79. As, however, is made clear by the recent decision of Ouseley J in *MR v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin), the cancellation of a passport restricts travel and engages EU law. As stated in that case at [15]-[17]:

"Engagement/breach of Directive 2004/38

15. As I have said, Mr Eadie did not really pursue what had at one time been the SSHD's primary argument, that the cancellation of the passport did not engage the rights under Articles 4 and 27 of the Directive. It is obvious that they do. There is no

relevant distinction between "engaging" and "breaching" here. Unless justified within the terms of the Directive, the cancellation of the passport breaches it.

16. After all, the avowed aim of the cancellation was to make it very difficult for MR to travel abroad and it is clear that it would have that effect. Although an identity card or other means of proving nationality can be used, the UK does not issue identity cards for the purpose of proving nationality; and a UK citizen relying on other means of proving nationality than a passport will encounter difficulties in air and Eurostar travel, as Mr Chamberlain QC for the Claimant demonstrated by his researches on the internet for what airlines and Eurostar required. Case C-215/03 *Oulane v The Netherlands Minister for Aliens and Integration* [2005] QB 1055 ECJ, at [22-28], which affirms that where nationality can be proved unequivocally by means other than a passport or identity card it has to be recognised for the purposes of Directive 2004/38, also points out that the requirement for a passport or valid identity card is aimed at simplifying the resolution of problems relating to the right of residence for citizens and national authorities, and at establishing a maximum which Member States can require.

17. The language of the Directive is not confined to barring a legal prohibition on departure from the country of nationality, unless the derogation in Article 27 is made out. The right is to reside and move freely. There is an obligation to issue a passport to nationals but it may be "restricted"; Article 27. It is restriction and not only prohibition which engages the derogation in Article 27. Some CJEU authorities refer to "prohibition" but that is because that is the nature of the restriction with which it was dealing; the Court was not confining "restriction" to "prohibition"."

80. There was no suggestion in the *MR* case that this depended on proving an intent to travel. Cancellation in itself involves a restriction. Indeed, that is its obvious purpose and in this case its expressly stated purpose. Further, cancellation occurred before XH was imprisoned, and he is in any event due to be released towards the end of this year.

81. For all these reasons, in our judgment EU law is engaged.

(2) Whether there was a breach of EU law in any of the respects alleged by XH.

82. Article 21 TFEU expressly acknowledges that any entitlement "to move and reside freely within the territory of the Member States [is] subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Grounds upon which such limitations may be imposed are set out in Article 27 of the Free Movement Directive, as set out above and include "public security".

83. Member States are allowed an area or margin of discretion in the area of public policy. As the CJEU stated in its judgment in Case 41/74 *Van Duyn* [1974] ECR 1337 at [18]:

"... the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty."

84. In its judgment in Case C-33/07 *Ministerul Administraţiei şi Internelor Direcţia Generală de Paşapoarte Bucureşti v. Gheorghe Jipa* [2008] ECR I-5157, the CJEU confirmed that this approach also applies in the context of a decision restricting the right of a citizen of a Member State to travel to another Member State. It stated at [23]:

"... the Court has always pointed out that, while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the Community context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to that effect, Case 36/75 Rutili [1975] ECR 1219, paragraphs 26 and 27; Case 30/77 Bouchereau [1977] ECR 1999, paragraphs 33 and 34; Case C-54/99 Église de scientologie [2000] ECR I-1335, paragraph 17; and Case C-36/02 Omega [2004] ECR I-9609, paragraphs 30 and 31)".

85. It is recognised that an especially wide margin of discretion is left to Member States where matters of national security are at stake.

86. XH contends that EU law was breached in any or all of the following respects:

(1) The Secretary of State's decision does not comply with the principles of proportionality as set out in articles 27 and 28 of the Free Movement Directive;

(2) The allegations made against XH do not reach the level of detail required by EU law if they are to justify restrictions upon free movement rights.

(3) Conventional judicial review is not sufficient since Article 31(3) of the Free Movement Directive requires the procedure adopted by this court to involve fact finding;

(4) The right to good administration, as enshrined in article 41 of the Charter of Fundamental Rights of the European Union ("the Charter"), reflects a general principle of EU law and was violated on the facts, in particular because he was not consulted and had no opportunity to make representations before the decision was taken;

87. As to (1), XH submits that Article 27(2) demonstrates that there must actually be behaviour causing risk. However, the WMS suggests a suspicion or mere risk of behaviour is sufficient. For example, it refers to the withdrawal of a passport where a person "may seek to harm" the United Kingdom. That suggests that the threshold set is too low. This is further supported by the fact that that the threshold is set higher in section 3 of the 2011 Act before a TPIM measure can be imposed.

88. It is correct that Article 27(2) requires that measures taken on public policy or public security grounds "shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned". It is to be observed, however, that:

(1) The WMS makes clear that any measures taken under it are required to be "necessary and proportionate".

(2) Although the decision needs to be based on personal conduct, we accept the Secretary of State's submission that this means that the justification is personal rather than general. It needs to focus on individual circumstances, but proof of facts in relation to the individual is not required.

(3) The Secretary of State's discretionary decision involves a risk assessment which is necessarily a prospective exercise.

(4) XH, and others whose passport is cancelled, can make an application to the Secretary of State for an alternative travel document if there are compelling circumstances requiring travel at any time, which could be issued to permit travel to a specified location. The Secretary of State would make her decision based on the circumstances at the time of such application and if the national security risk could be adequately managed.

89. In our judgment there is force in these general considerations relied upon by the Secretary of State. In considering their application to the facts of this case, it is clear from the letters in this case that the decision to cancel XH's passport is based exclusively on his personal conduct and is based on national security reasons. If one considers, for example, the letter of 3 May 2016, the basis of the Secretary of State's risk assessment is stated to include that XH "is an Islamist extremist"; he has "repeatedly expressed a desire to travel overseas to participate in Islamist extremist activities"; he has "been involved in activities in tangible and practical support of Syria-based Islamist extremist associates", and he "is intending to travel overseas to engage in terrorist related activity, likely to be related to Syria". In our judgment the

decision of the Secretary of State to cancel XH's passport made in the light of these considerations and in the interests of national security meets the justification requirements of Article 27.

90. As to (2), XH contends that the allegations that are said to justify the decision challenged are wholly un-particularised. For example, there is no information as to where and when XH is said to have offered support to extremists or where and when he is said to have expressed a wish to travel to Syria.

91. XH relies upon Articles 30(2) of the Free Movement Directive which provides that:

> "Article 30
> ….
> (2) The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security."

92. In the case of *ZZ (France)* it was recognised that these procedural rights may be restricted where this is justified by the interests of state security. It was nevertheless decided that even in such a case:

> "… it is incumbent on the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him." (at [68])

93. The meaning of that decision was considered by the Court of Appeal in *ZZ (France) v Home Secretary (No 2)* [2014] QB 820. It was held that it imposed a minimum level of procedural protection whereby the essence of the grounds upon which the decision was based must always be disclosed to the person but that related evidence may be withheld from disclosure on the grounds of national security. As Richards LJ stated at [24]-[25]:

> "24. It is important to recall that para 65 is concerned with disclosure of the grounds on which the decision was based. The judgment moves on to consider the question of disclosure of the related evidence. It states in para 66 that the weighing up of the right to effective judicial protection against the necessity to protect national security, on which the conclusion set out in para 65 is founded, "is not applicable in the same way to the evidence underlying the grounds". Thus, although the essence of the grounds

must be disclosed, the related evidence may be withheld from disclosure for reasons of national security.

25. This leads the court to state in para 68 that the national court must "ensure that the person concerned is informed of the essence of the grounds … in a manner which takes due account of the necessary confidentiality of the evidence". That still makes clear that the essence of the grounds must be disclosed but provides that the manner of disclosure must take "due account" of the necessary confidentiality of the evidence, that is to say it must protect the confidentiality of evidence disclosure of which would be contrary to national security. The court does not state in terms what is to happen if the essence of the grounds cannot be disclosed without at the same time disclosing such confidential evidence. To my mind, however, the position in that event is clear from what the court does say: the essence of the grounds must still be disclosed. The qualifying words relate to the manner of disclosure of the essence of the grounds; they do not affect the extent to which the grounds must be disclosed."

94. XH submits that this means providing sufficient particulars of the case against him to enable him to put forward any positive case he may have and that means knowing details such as who, when and where. In relation to the need for particulars XH relies on the case of *Kadi (No 2)* [2014] All ER (EC) 123 at [141]. As Richards LJ, however, observed in *ZZ (France) (No 2)* at [39], having been referred to the same case, what is required by way of disclosure is "highly fact specific". As he further observed at [29], *Kadi* "does not deal with the specific question answered in the *ZZ* case (which did not arise on the facts of the *Kadi* case) and does not seem to me to cast any real light on the meaning of the court's answer to that question".

95. On the specific facts of this case the position is that, following the grant of a declaration under section 6 JSA 2013, the Secretary of State disclosed further particulars of the case against XH in the letter of 3 May 2016 and also provided port stop records. This is in addition to the further reasons provided in the letter of 16 February 2015. Further, the Special Advocates confirmed that no further disclosure issues remained in respect of *ZZ (France).* In those circumstances we accept the Secretary of State's case that XH has had sufficient material to comply with the disclosure requirements in that case.

96. As to (3), XH relies on Article 47 of the Charter which provides that:

"Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

97. As the explanatory notes make clear, the second paragraph corresponds to Article 6 of the ECHR. This means that regard can be had to the Article 6 case law in interpreting Article 47.

98. In this connection, XH relies on the decision in *Tsfayo v United Kingdom* (2009) EHRR 18 and the need for determination by a body which has "full jurisdiction". As to whether this will require fact finding, XH contends that the key issues are the nature of any fact finding involved and the procedural safeguards that apply when the administrative decision was taken – see *Tsfayo* at [46] – [47]. It is submitted that there is a need for there to be safeguards of independence when the administrative decision is taken if conventional judicial review is to be sufficient – see *R (Wright) v Secretary of State for Health* [2009] 1 AC 739 at [23]. Applying this approach, XH contends that conventional judicial review is not sufficient in that there are no safeguards of independence when the Secretary of State takes a decision and it is clear that a number of factual findings are required in order to determine whether the decision challenged is proportionate.

99. By way of analogy XH relies upon the decision of the Court of Appeal in *Secretary of State for the Home Department v MB* [2007] QB 415, which concerned control orders. The statute in that case required the Secretary of State to have "reasonable grounds for suspecting that the individual is or has been involved in terrorism related activity". The Court held that this involved an objective question of fact which the court could not review without itself deciding the facts. It is submitted that similar considerations apply to the Secretary of State's decision in this case, which also concerned terrorism related activity.

100. XH further relies upon Article 31 of the Free Movement Directive which provides that:

> *"Article 31*
>
> Procedural safeguards
>
> 1. The person concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
>
> ….
>
> 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed

measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28."

101. As to XH's reliance upon Article 31 we agree with the Secretary of State that this is of little assistance since it recognises that review may be an appropriate redress procedure and that an appeal process is not required.

102. In relation to the *Tsfayo* case the Secretary of State relies on the Supreme Court decision in *Ali v Birmingham City Council* [2010] 2 AC 39 in which *Tsfayo* was distinguished. At [5] Lord Hope endorsed the following passage from the joint dissenting opinion in *Feldbrugge v The Netherlands* [1986] 8 EHRR 425 at [15]:

"The judicialisation of dispute procedures, as guaranteed by article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind."

103. As stated by Lord Hope at [54]-[55], that facts have to be decided in the course of the determination being reviewed does not in itself mean full fact finding on appeal is required. The overall nature of the judgmental exercise involved has to be considered. If fact finding is just "a staging post" to a broader evaluative judgment which has to be made then review may well be sufficient. The *Ali* case concerned a reviewing officer's decision as to whether the Council's offer of housing accommodation had been refused "without good cause" in circumstances where there was an issue of fact as to whether the applicants had received a letter notifying them of the consequences of refusal. Lord Hope's approach to the need for fact finding was as follows:

"54. As the court said in *Tsfayo's* case, para 46, the issues in cases such as *Runa Begum's* case [2003] 2 AC 430 required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. That was not so here, as no specialist knowledge was required to determine the issue whether or not the letters were received by the applicants.

55. The way the reviewing officers approached their task in these cases shows very clearly how the scheme works in practice. For ease of administration the review is entrusted to a single officer who is equipped to deal with issues as to the suitability of the accommodation that has been declined. An answer to the question whether or not the letters were received was incidental to a more searching and judgmental inquiry into the accommodation's suitability. It was, as Lord Bingham put it in *Runa Begum's* case [2003] 2 AC 430, para 9(2), a staging post on the way to a much broader judgment that had to be made. These cases are quite different from *Tsfayo's* case 48 EHRR 457, where no broad questions requiring professional knowledge or experience had to be addressed once the question whether there was good cause had been answered. In these circumstances I would hold that the ratio of the decision in *Runa Begum's* case should be applied and that the absence of a full fact-finding jurisdiction

in the court to which an appeal lies under section 204 does not deprive it of what it needs to satisfy the requirements of article 6(1)."

104. The case of *Ali* went to the ECtHR in *Ali v United Kingdom* [2015] H.L.R. 46. In the ECtHR's judgment it is stressed that "full jurisdiction" means "sufficient jurisdiction" and that it is well recognised that the scope of review of administrative decisions may be limited. As the ECtHR stated at [76]-[77]:

"76. Both the Commission and the court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" ("*plaine jurisdiction"* in French) will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see, amongst many authorities, *Zumtobel v Austria* (A/268-A) (1994) 17 EHRR 116 at [31]-[32]; *Bryan*, cited above at [43]-[47]; *Miller v Austria* (26507/95, 23 November 1999; and *Crompton v United Kingdom* (42509/050) 27 October 2009 at [71] and [79]

77. In adopting this approach the Convention organs have had regard to the fact that in administrative-law appeals in the Member States of the Council of Europe it is often the case that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings rather than taking factual decisions. It can be derived from the relevant case law that it is not the role of art.6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities. In this regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of "expediency" and which often involve specialised areas of law (for example, planning- *Zumtobel* at [31] and [32], and *Bryant* at [47], both cited above; environmental protection- *Alatulkkila v Finland* (33538/96) at [52]. [28] July 2005; regulation of gaming- *Kingsley v United Kingdom* (35605/97) at [32] ECHR 2002-IV)."

105. The ECtHR concluded that there had been no violation on the facts and that it was not a comparable case to *Tsfayo*. As was stated at [86]:

"86. The determination made in the present case and the underlying legislative scheme are not, as the applicant submitted, analogous to those that were before this Court for consideration in *Tsfayo* (that case, cited above, being concerned with payment of a housing benefit) but rather, in the court's view, lend themselves more to the national courts' analysis of decisions by homelessness review officers in *Runa v Begum.* Strikingly, there is no question in the present case, as in *Tsfayo,* of "a fundamental lack of objective impartiality" on the other part of the pre-judicial reviewing entity such as to "infect the independence of its judgment in relation to the finding of primary fact which could not be adequately scrutinised or rectified by judicial review".

106. In our judgment the present case also falls on the *Begum* rather than the *Tsfayo* side of the line. Although the Secretary of State's decision will involve a consideration of facts it essentially involves a risk assessment being made in the light of policy as set

out in the WMS. That assessment is prospective in focus; it involves elements of judgment and evaluation, and that judgmental and evaluative exercise requires experience and expertise.

107. Further, judicial review is a flexible process and the court can examine facts in an appropriate case – see, for example, *Bubb v. Wandsworth LBC* [2011] EWCA Civ 1285, [2012] PTSR 1011.

108. As to XH's reliance on the *MB* case, that case turned on the particular wording of the statute under consideration. That wording does not carry across to the different wording of the WMS and the different exercise which is required to be performed.

109. Nor is it correct that there is some requirement of safeguards of independence at the time of the decision for judicial review to be sufficient. The case of *Wright* which XH relies upon turned upon the particular statutory scheme under consideration in that case and does not purport to establish any generally applicable rule to that effect.

110. For all these reasons, in our judgment there is no necessity for fact finding and judicial review is an appropriate and sufficient form of redress.

111. As to (4), XH contends that his right to good administration was violated on the facts because he was not consulted about his passport before it was withdrawn and there was no good reason for this.

112. XH relies upon Article 41 of the Charter which provides:

"Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

…."

113. It is submitted that this was not a case for urgency, that fairness requires a right to be heard before such a decision is taken and that there has been no explanation as to why that was not done.

114. A similar argument was rejected by the Court of Appeal in *ex parte Everett* - see O'Connor LJ at p818C-E (see also p819E-F):

> "… But the judge came to the conclusion that the fair application of the policy required that if a passport was refused because a warrant was outstanding against the applicant, inquiry had to be made of the applicant before refusing a passport, as to whether he had anything to say.
>
> In my judgment the judge fell into error in concluding that that was required for the fair exercise of his discretion. It seems to me that the Secretary of State, in the fair exercise of his discretion, was entitled to refuse the passport but to give his reason for so doing, and the fair giving of the reason, if the reason be that there is a warrant for the applicant's arrest outstanding, was to tell him when the warrant was issued and what offence was charged. Once he has done that he has all but discharged his duty, but he should, when notifying the applicant that that was the reason for refusing the passport, tell him that if there were any exceptional grounds which might call for the issue of a passport, he would consider them."

115. Further, there are obvious concerns in a national security context that the exercise of the Royal Prerogative to cancel or withdraw a passport could be undermined by the provision of advance warning of the potential exercise of the power. Such concerns militate strongly against the existence of a general duty to afford an opportunity to make representations prior to the exercise of the Royal Prerogative.

116. As to XH's reliance on Article 41, as Nicol J recognised in *R (AZ) v. Secretary of State for the Home Department* [2015] EWHC 3695 (Admin), whilst the right in Article 41 of the Charter reflects a general principle of EU law, Member States are entitled to withhold disclosure, and hence restrict the right to make representations, on grounds of national security.

117. That case concerned the refusal of a travel document and involved the consideration and rejection of very similar arguments as advanced under this head this case. As the Judge held at [46]:

> "46. As I have noted above, part of Mr Southey's submissions as to the disclosure which should have been made to the claimant prior to the refusal of a travel

document, was dependent on him making good the other procedural ground of challenge. In short, he argued, if the claimant is entitled to further information as to the SSHD's national security case as part of his right to an effective judicial challenge, that further detail should have been supplied in advance of the administrative decision-making. I am about to turn to consider that second procedural challenge now, but for reasons which I give, it is not successful. Accordingly, it can give the claimant no further for this first procedural challenge. In my judgment, on the contrary, it further undermines the first procedural challenge, If, as I conclude, the SSHD is entitled to withhold material whose disclosure would harm the interests of national security from the claimant in the course of this litigation, it would be illogical if she was obliged to disclose that same information to the claimant in advance of taking the decision. *Fayed* demonstrates that the common law does not require such a conclusion. Article 41 allows the EU institutions to withhold access to the file if this is necessary to respect the legitimate interests of confidentiality and of professional and business secrecy. I agree with Mr Blake that, so far as article 41 embodies a general principle of good administration that must be followed by member states, they must likewise be permitted to withhold disclosure which would harm national security."

118. For all these reasons we conclude that EU was not breached in any of the respects alleged.

Issue 4 **- Breach of Article 6 ECHR (ground 2 – XH).**

119. In the light of our conclusion that EU law is engaged, XH accepts that this ground does not add to his case. The points made in reliance upon Article 6 can all be and have been made in the context of the arguments advanced in reliance of Article 47 of the Charter, as addressed and rejected above.

120. In those circumstances it is not necessary to address this ground separately although it should be noted that the Secretary of State disputes that Article 6 is engaged on the grounds that Article 6 does not apply to "the hard core of public-authority prerogatives"(see *Ferazzini v. Italy* (appln no. 44759/98, 12 July 2001) and that the refusal of a passport does not engage Article 6 since it does not amount to a determination of a civil right - see *Peltonen v. Finland* (app no. 19583/92) 80-A DR 38.

Issue 5 **- Breach of Article 8 ECHR (ground 3 – XH).**

121. In the light of our conclusion that EU law is engaged, XH accepts that this ground does not add to his case.

122. In any event, we agree with the Secretary of State that Article 8 is not engaged in XH's case.

123. The case-law of the ECtHR has emphasised that it is necessary for an applicant to provide evidence of real and significant interference with an exercise of his right to respect for his private life before the ECtHR is willing and able to conclude that Article 8 is applicable: see, for example, *Smirnova v Russia* (Application no. 46133/99), *Iletmis v Turkey* (Application No. 29871/96) and *M v Switzerland* (Application No. 41199/06).

124. As the Secretary of State points out, none of the matters on which XH now relies demonstrates an interference with XH's rights under Article 8. The cancellation of his passport does not interfere with his family life rights. The reference to potential trips to visit his partner's family in Algeria is not sufficient to engage the protection of Article 8. Nor is the prospect of making a pilgrimage to Saudi Arabia. The desire to take short breaks in Europe does not engage Article 8. In all the circumstances, XH has failed, on the facts and in his evidence, to demonstrate any interference with his Article 8 rights.

***Issue 6* - Insufficient justification in domestic law (ground 4 – XH).**

125. In the light of our conclusion that EU law is engaged, XH accepts that this ground adds little, if anything, to his case.

126. XH contends that an intense standard of review is required because the right of free movement is important and that, on the open material, insufficient material and reasons have been disclosed.

127. As to the standard of review, as XH acknowledges, his submissions are inconsistent with the decision of Burnett J in *R (Ali) v. Secretary of State for the Home Department* [2012] EWHC 3379 (Admin). In that case Burnett J stated at [23]:

"The task of the court is the familiar one of evaluating whether the decision was one open to the Secretary of State on the information available to her, or otherwise considering conventional pubic law grounds of challenge. That is not to say that the

fact that an individual has previously been issued with a British passport is not important in evaluating whether the decision reached was a rational one, in public law terms. It is unhelpful in this context to speak in terms of burdens of proof. The reality is that, having once been satisfied that an individual was entitled to a passport, the Secretary of State would need to advance cogent reasons that stood up to scrutiny why, on a later application, she was taking a different view. The refusal to renew the passport of someone who has enjoyed the benefits of a British passport for a decade is a serious step with serious consequences. No less would be required to satisfy a rationality test."

128. In accordance with *R (Ali)* the standard of review to be applied in the present case is the ordinary one based on conventional public law grounds of challenge. We agree with the Secretary of State that this is not affected by the decision in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 which is relied upon by XH. That case concerned a decision to revoke British citizenship. As Lord Mance stated at [98], such a measure is "on any view, a radical step, particularly if the person affected has little real attachment to the country of any other nationality that he possesses and is unlikely to be able to return there". As such, it is a very different measure and one which offers no real insight into the approach to the cancellation or withdrawal of a passport.

129. As to the suggestion that insufficient material and reasons have been disclosed into open, that is inconsistent with the Special Advocates' acknowledgement that no further disclosure issues remain. The grounds and material which has been provided are sufficient to meet whatever test of disclosure applies.

***Issue 7* - Unfairness and breach of Article 6 ECHR, EU law and common law because there is insufficient protection of legal professional privilege ("LPP") (ground 6 – XH).**

130. In November 2014 the *Belhadj* litigation in the Investigatory Powers Tribunal ('the IPT') resulted in disclosures of security service policies and internal guidance concerned with the treatment of material subject to LPP. That material went into the public domain at a hearing on 6 November 2014. It essentially demonstrated that LPP material could be used for operational purposes.

131. XH submits that no fair hearing is possible in XH's case unless and until there are proper safeguards in place that ensure that XH can communicate in confidence with his lawyers without the communications being used by the security services. At present, no such safeguards are in place. That is unlawful. In support of this submission XH relies in particular on the following considerations:

(1) LPP is absolute – *see Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at [25]. As stated in *B v Auckland District Society* [2003] 2 AC 736 a lawyer must

be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent'.

(2) The reason why LPP is absolute is because of the risk of a chilling effect if it is qualified. In addition, there is an inherent risk it will infect litigation.

(3) This is consistent with the case law of the European Court of Human Rights – see, for example, *Michaud v France* (2014) 59 EHRR 9 - and the case law of the Court of Justice of the European Union – see, for example, Case C-550/07 *Akzo Nobel Chemicals Ltd v European Commission* [2010] ECR I-8301.

(4) These matters are particularly important where a person faces (as XH does) some of the most serious allegations that anyone can face.

(5) The absence of a fair procedure means that the decision challenged is unlawful because there is no fair procedure. The failure to safeguard LPP undermines fairness by potentially having a chilling effect on the instructions provided.

132. It is to be noted that XH does not suggest that material or information protected by LPP has been obtained in this case. XH's complaint is that it may have been and that the safeguards in place are not sufficient to ensure that it has not been.

133. The appropriate tribunal to hear any complaint as to whether proper or sufficient safeguards are in place is the IPT. Any such challenge is within the exclusive jurisdiction of the IPT: see s. 65 of the Regulation of Investigatory Powers Act 2000 ("RIPA") and the judgment of the Supreme Court in *A v. B* [2010] 2 AC 1 and of SIAC in *ZZ v The Secretary of State for the Home Department* [2014] UKSIAC B1 (14 November 2014) at [60].

134. XH disputes this on the grounds that the court must have powers to protect against any abuse of its own processes. There is, however, no evidence of any such abuse. XH's case is based on speculation.

135. Very similar arguments to those advanced were considered and rejected by SIAC in the ZZ case. As Irwin J stated in that case:

"59. Where does that leave us? Firstly, that there may be material obtained and used by the Security Service or other agencies which represents an incursion on LPP is simply not new. Secondly, we fully accept the importance of legal professional privilege for the reasons we have indicated. Nevertheless we accept that it is of particular importance in SIAC, given the nature of this jurisdiction. We accept that the safeguards must be rigorous.

60. Nevertheless, we consider that proceedings which represent a direct challenge to the procedures and safeguards, including the successive policies now revealed within the Security Service, are for the IPT, not for us.

61. However, that does not preclude an application in SIAC for an abuse of process, where such application is founded in the specific facts revealed to SIAC. SIAC must have the power to protect itself from abuse. If, on the facts, it could be shown in a given case that information was obtained in breach of the safeguards, obtained deliberately in an unlawful manner, then that might well be a relevant matter for SIAC in an abuse of process application. But, provided that the material is not sought to relied on, the only form of abuse which would be relevant would be what is describes as *Bennett/Mullen* abuse after the well known cases of *R(Bennett) v Horseferry Road Magistrates* [1994] 1AC A2 and *R v Mullen* [1999] 2 Cr.App.R. 143. Where material is not relied on, and cannot therefore affect the outcome on the evidence which is relied on, it would only be when misconduct by the authorities was so bad or so blatant that *Bennett/Mullen* abuse arose, that SIAC could consider evidence bearing on the obtaining of information not sought to be deployed.

62. SIAC's principal concern must be to ensure that its own process is protected from the use of material obtained by an incursion on LPP. We accept there exists a hypothetical risk that material gained in breach of LPP might be used to gain a tactical advantage, although not introduced into evidence. As it was put by Mr Southey, it might be an expression of concern about the strength of this or that part of an appellant's position, which he says might stimulate those who represent the Secretary of State to mount an argument or to raise a point. We have considered that with some care but we find it a tenuous proposition. If it was demonstrated, then, of course, it might be the basis for an appropriate application. But in order for it to arise, in practice, the intercepted material would need to be brought before the lawyers with conduct, then, of course, all sorts of other difficulties would arise. It is precisely to avoid that risk that the policies that we have seen appear to have been drafted. The alternative is that tactical suggestions based on the LPP material might cross the barrier to those with conduct. That is a theoretical risk, but no more."

136. We agree with that analysis. On the evidence in this case there is a theoretical risk only and that is insufficient.

137. Further, none of the cases relied upon by XH establish that the mere assertion that LPP communications might have been intercepted means that no fair hearing is possible.

Conclusion

138. For the reasons outlined above we reject XH and AI's challenges to the Secretary of State's decisions and the claims made in these proceedings are dismissed.