

Appeal No: PC/02/2006  
Date of Hearing: 23rd-31st July 2007  
Date of Judgment 30<sup>th</sup> November 2007

**PROSCRIBED ORGANISATIONS APPEAL COMMISSION**

Before:

SIR HARRY OGNALL (Chairman)  
MISS L BOSWELL QC  
MR S CATCHPOLE QC

**LORD ALTON OF LIVERPOOL & OTHERS**  
**(In the Matter of The People's Mojahadeen Organisation of Iran)**

Appellants

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellants: Mr Nigel Pleming QC, Mr Mark Muller QC and  
Mr Edward Grieves  
Instructed by Mr Stephen Grosz of Bindman & Partners

Special Advocates: Mr Andrew Nicol QC and Mr Martin Chamberlain  
Instructed by the Special Advocates Support Office

For the Respondent: Mr Jonathan Swift and Ms Gemma White  
Instructed by the Treasury Solicitor for the  
Secretary of State

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**OPEN DETERMINATION**

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## **A. THE HISTORICAL AND PROCEDURAL BACKGROUND**

### **(i) Introduction**

1. Under Section 3(3)(a) of the Terrorism Act 2000 (the 2000 Act), on the 28<sup>th</sup> February 2001 the Secretary of State laid before Parliament, in draft, the Terrorism Act (Proscribed Organisations) (Amendment) Order 2001 which sought to add the PMOI (known as “the Mujaheddin-e-Khalq” or MeK) to Schedule 2 of the TA 2000 **[5/A2/3-19]**. The draft order was approved by affirmative resolution and the Order came into force on the 29<sup>th</sup> March 2001.
2. By an application dated the 5<sup>th</sup> June 2001 the PMOI (and Mr Abedini) applied to the Secretary of State pursuant to the provisions of section 4(1) and 2(a) to be removed from the list, or (as is sometimes expressed) to be de-proscribed **[5/A5/25-40]**.
3. By letter dated 31<sup>st</sup> August 2001 **[5/A6/41-44]**, the Secretary of State concluded that he remained satisfied that the organisation was then “*concerned in terrorism*” as defined by the Terrorism Act 2000, in that it “*commits or participates in acts of terrorism*”. Accordingly, the application was refused.
4. That refusal was the subject of an application for Judicial Review. It was refused by Richards J (as he then was) on the 17<sup>th</sup> April 2002. The Judge held that, within the relevant statutory framework, the appropriate venue for challenge lay in an appeal to POAC against a refusal by the Secretary of State to deproscribe.
5. Meanwhile an appeal against the refusal to deproscribe was lodged with POAC on 12<sup>th</sup> October 2001 (the “First Appeal”), and the hearing was ultimately fixed for 30<sup>th</sup> June 2003.
6. While that appeal was still pending, on the 13<sup>th</sup> March 2003 the PMOI made a second application to the Secretary of State to de-proscribe (the “Second

Application”) relying on the original material supporting the application of June 2001, supplemented by further material lodged as part of the application for Judicial Review and material served on the Secretary of State pursuant to the First Appeal. Additionally, in an undated document (but in context probably sent to the Secretary of State in late May 2003) the then Appellants drew attention to (a) the voluntary surrender of their arsenal of all weapons (save for a limited number of side arms) to the occupying forces in Iraq, and (b) their total non-aggression towards the coalition forces. It was submitted that continued proscription was unjustified **[5/9/52-54]**.

7. In response, and by letter dated 11<sup>th</sup> June 2003, the Secretary of State maintained his refusal to de-proscribe **[5/10/56-61]**.
8. No appeal was made from that second decision, and in June 2003 the then appellants withdrew their still pending appeal to POAC against the Secretary of State’s first refusal of their application (this date is taken from the Appellants’ Procedural chronology **[1/A4/145]**).
9. We pause to note that the fact that no appeal was lodged against the second refusal, and that the First Appeal was withdrawn is said by the Appellants to have been a “*protest*” by the PMOI against the decision by the British and US Governments to bomb the PMOI bases within Iraq, shortly before April 2003 **[2/Application Paragraph 10]**. It is to be observed, however, that representations on behalf of the PMOI were made to the Secretary of State in May 2003 **[5/A8/50]** and a Witness Statement of Mr Mohammad Mohaddessin dated the 16<sup>th</sup> June 2003 was prepared **[5/B5/224]** some time after the bombing of Camp Ashraf. Mr Grosz, in a speech at the Symposium of Parliamentarians & Jurists in London in March 2005 **[2/17 /12]**, appeared to suggest that POAC was “*a hostile environment*” and that “*the PMOI had decided, rightly in [his] view, that their efforts, funds and time could be better spent by effectively promoting democracy in Iran, rather than paying lawyers to go through something which was effectively a charade*”.

10. We are also aware of other events that may have affected the PMOI at around this time. In particular on the 17<sup>th</sup> June 2003 the offices of the NCRI near Paris were raided **[4A/3-4]**. A large number of NCRI members were held, some of whom (including Maryam Rajavi) were remanded in custody. Although a substantial sum of money was found, no prosecutions were brought. In July 2003, the Metropolitan Police arrested a number of MeK sympathisers in the UK and searched associated MeK premises.
11. The circumstances surrounding these events may provide a more realistic explanation as to why the PMOI did not continue with the appeals to POAC in June 2003. Of course, it is not necessary for this Commission to decide why the First Appeal and Second Application were not pursued by the PMOI. There appears to be no limit to the number of applications to deproscribe (and appeals) that can be made by or on behalf of a proscribed organisation. However, we note the explanation given on behalf of the PMOI and the relevant timetable and surrounding circumstances as this seems, at least to this Commission, to be an example of the unhelpful approach taken by and behalf of the PMOI to events and the evidence. Nothing is quite what it seems. We refer to this in some detail below in relation to the evidence of Mr Mohammed Mohaddessin that we have had to consider.
12. Much complaint is made on behalf of the PMOI in relation to propaganda put out by the Government of Iran and its supporters. In our view the PMOI can equally be criticised for the propaganda that they appear to rely upon and for the shifting approach to the evidence and material which we have had to consider.

**(ii) The PMOI**

13. A short summary of the history of the PMOI appears in the Appellants' Written Submissions **[1/A3/33 and following]**.
14. The PMOI is an Iranian political organisation and a member of the National Council of Resistance of Iran (NCRI) (which is not proscribed in the UK). It

was founded in 1965. The purpose was initially to oppose the regime of the Shah. Its present stated purpose is, and has been for some years, the replacement of the existing theocracy with a democratically elected, secular government in Iran.

15. It took an active part in the protest within Iran that ultimately led to the downfall of the Shah in 1979. Thereafter, it speedily came into conflict with the succeeding fundamentalist regime of the Ayatollah Khomeini. The PMOI contend that there followed for several years within Iran a sustained regime of oppression, violence and killings orchestrated by the clerical rulers of the country. This campaign within Iran was contemporaneous with the war between that country and Iraq during the years 1980 to 1988.
16. Towards the end of 1981, many of the members of the PMOI and supporters went into exile. Their principal refuge was in France. But in 1986, after negotiations between the French and the Iranian authorities, the French government effectively treated them as undesirable aliens, and the leadership of the PMOI with several thousand followers relocated to Iraq.
17. There, they were located in a number of areas, but principally in Camp Ashraf – a location some 60 miles North of Baghdad where they constructed what eventually became a small town of about 3000 inhabitants. There they kept, until the invasion of Iraq by the coalition forces in 2003, a formidable arsenal of weapons including tanks and rocket launchers. The significance of this equipment and its ultimate surrender to the forces of the United States features in arguments on both sides which we will hereafter address.
18. From Iraq they lent military support to their hosts in the war against Iran until its conclusion. They conducted violent operations inside Iran until 2001. The nature and the extent of those operations, and the circumstances surrounding their conclusion in 2001 were the subject of considerable controversy. We will review those issues elsewhere.
19. Since the proscription in 2001 and the occupation of Iraq in 2003 the PMOI have continually pursued a campaign to legitimise their status as a secular,

democratic movement intent upon the peaceful overthrow of the present undemocratic regime in Iran, to which end they seek to enlist support at the highest level in the United Kingdom (and elsewhere) for the promotion of that object. The organisation has engaged the sympathy of a number of members of both Houses of Parliament. The present Appellants are thirty five in number (one since deceased), being sixteen members of the House of Commons and nineteen members of the Upper House. Included in the latter group are one former Lord of Appeal in Ordinary and five QCs.

20. These Parliamentarians maintain that the continued proscription of the PMOI invokes the constraints imposed by virtue of section 12 of the Terrorism Act 2000 from their otherwise right to support the PMOI by all available democratic and lawful means. Accordingly, their status to apply and appeal in this case is afforded to them by section 4(2) of the 2000 Act. They say that they wish to, and consider that they are entitled to, invite support for the PMOI, arrange meetings to further the political activities of the PMOI, address meetings to encourage support for the PMOI and invite others to provide money and property to further the political activities of the PMOI. They say that that have been prevented from being in contact with the PMOI, and carrying out these activities in support of the PMOI.
21. By notice dated 13<sup>th</sup> June 2006 the Applicants applied to the Secretary of State to de-proscribe the PMOI. The full notice of application is to be found at [2].
22. It is necessary only to set out in summary form here the essential grounds advanced in support of the application:
  - 22.1. That (whatever the position had been at the time of proscription) the PMOI was not at the time of the application “concerned in terrorism” within the meaning of Section 3(5) of the Terrorism Act 2000.
  - 22.2. That in any event it fulfilled none of the criteria laid down by the Secretary of State for the exercise of his discretion (notwithstanding an adverse conclusion on 22.1 above) to continue to proscribe.

- 22.3. Further, the continued proscription was not objectively justified within the meaning of Articles 10 and 11, and Article 1 of the First Protocol of the European Convention on Human Rights.
23. At this stage, we summarise the reasons set out in support of those grounds. They will be addressed as appropriate and in more detail at a later stage in this decision.
- 23.1. Whatever the accurate characterisation of the organisation's activities between 1980 and 2001, the position in 2006-2007 is radically different, and has been so since 2001.
- 23.2. That the PMOI has conducted no military activity of any kind since about August 2001, whether in Iran or elsewhere in the world.
- 23.3. That this is attributable to a deliberate decision of the PMOI made at an extraordinary Congress held in Iraq in June 2001, namely, to abandon all military action (or activities) in Iran. This is said to have been ratified by 2 ordinary congresses in September 2001 and September 2003. It is asserted that this policy *"has been stated publicly and the PMOI's leadership and membership signed statements to this effect"* [2/**Application Paragraph 27**].
- 23.4. That the internal branch in Iran thereafter halted its operations and the PMOI subsequently definitively dissolved its operational units in Iran.
- 23.5. That on the 6<sup>th</sup> September 2004 and in February 2006 the then PMOI Secretary Generals made public statements which amounted to clear and unequivocal denunciations of terrorism on behalf of the PMOI.
- 23.6. That in early 2004 all but 4 of the nearly 3,000 persons then living in Camp Ashraf had each individually signed and given to the United States authorities declarations forswearing participation in, or support for, terrorism, and rejecting violence and hostile acts.

- 23.7. That the PMOI had been wholly non-aggressive during both the First Persian Gulf War and more particularly during the Second Persian Gulf War (Operation Iraqi Freedom) in 2003.
- 23.8. That on the 15<sup>th</sup> April 2003 and 10<sup>th</sup> May 2003 the PMOI had signed agreements with the United States forces in Iraq whereby they gathered in one PMOI base and consolidated their military arsenal at another base, both of which would be secured by the Coalition Forces. This handover of the military arsenal was explicitly acknowledged in writing to be an act of cooperation, and not one of surrender.
- 23.9. That, following extensive investigations by the Coalition Forces, by a proclamation dated 2<sup>nd</sup> July 2004 the United States military had accorded the residents of Camp Ashraf "*Protected Persons*" status under the Fourth Geneva Convention. That this status was wholly incompatible with any of the Protected Persons thereafter being treated as terrorists.
- 23.10. That the PMOI did not satisfy any of the 5 criteria adopted by the Secretary of State in the second stage of his duty, namely the exercise of his discretion.
- 23.11. That weight should be given to the wide extent of both academic and political support for de-proscription within the UK and elsewhere.
- 23.12. That the repressive nature of the present regime in Iran and its sponsorship of terrorism was something that the Secretary of State should take into account, certainly in the exercise of his discretion as to whether or not to maintain the proscription.
- 23.13. That the democratic nature of the PMOI and the fact that the PMOI has provided information in relation to the Iranian regime's nuclear

projects should be given account and its importance should not be underestimated.

23.14. That the above factors, combined with the 5 years that had since passed since the summer of 2001 demanded the conclusion that continued proscription could not be lawfully justified.

24. Following receipt of the 2006 Application the Secretary of State was supplied with three documents by his civil servants, intended to assist him in his decision in the matter. (The decision was actually taken by the then Minister of State at the Home Office, Mr. Tony McNulty MP, but the Submission was sent to the Secretary of State and Baroness Scotland, amongst others. For convenience in this Determination, we have used the title “Secretary of State” to refer to the relevant decision-maker.)
25. First, there was a Submission signed by a Home Office official and prepared by the Home Department (with input from other sources) **[1/D2/84]**. One of the contributors to this document was Mr. Benjamin Fender who gave oral evidence before the Commission. Mr Fender is a middle-ranking civil servant in the Foreign and Commonwealth Office (FCO) who had for a time occupied the Iran desk.
26. Second, there was an assessment from JTAC of August 2006, drawn up specifically and solely for the Secretary of State’s assistance in reaching his decision.
27. Third, there was a draft refusal letter **[1/D2/89]**.
28. These three documents will be considered in detail below. In our view, close consideration of the three documents together is essential in any proper review of the Secretary of State’s decision in this case.
29. The Home Department’s recommendation was that the application for proscription be refused and that a letter in the terms of the draft be sent to the Applicants.

30. After consideration of that material the Secretary of State adopted the advice given, and a letter in the terms of the draft was sent to the Applicants, dated 1<sup>st</sup> September 2006 [1/B3/39].

31. In that letter (the “Decision Letter”) the Secretary of State concluded;

*“Accordingly, even though there has been a temporary cessation of terrorist acts, I am not satisfied that the organisation and its members have permanently renounced terrorism”* (para 22)

and:

*“Mere cessation of terrorist acts do not amount to renunciation of terrorism. Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons will be resumed in the future”* (para 23).

### **(iii) The Notice of Appeal**

32. The Appellants appealed on the 30<sup>th</sup> October 2006 [1/B6/51]. It is not necessary to set out in this Determination all of the grounds relied upon.

33. The essential thrust of the Grounds of Appeal is that, whatever the nature of the organisation’s activities at the time of proscription

33.1. since 2001 the PMOI and its members have ceased all military activity and have dissolved its operational units in Iran;

33.2. that it had only retained its military arms within Iraq until early 2003 for defensive purposes;

33.3. it had voluntarily handed over all military arms to the Coalition forces in May 2003;

33.4. it had renounced terrorism and rejected violence;

33.5. that the granting of “*Protected Persons*” status to those in Camp Ashraf in July 2004 was inconsistent with the continued designation of the organisation as a terrorist one.

34. Accordingly, it was asserted that – whatever the true position at the time of the initial proscription – for a period of more than 5 years the PMOI had not been “concerned in terrorism” as defined in sections 1 and 3 of the Act and could not at the date of the Decision be lawfully regarded as an organisation “concerned in terrorism”.
35. At paragraph 16 of the Notice of Appeal the Appellants asserted that “*the Act requires consideration of the present position at the time of the decision to proscribe, and at the time when the de-proscription is considered. Where, as here, there is no evidence of the PMOI being so presently concerned, the Secretary of State cannot continue the proscription on the basis that at sometime in the past the organisation was concerned in military activities.*”
36. Further, at Paragraph 25 of the Notice of Appeal the Appellants asserted that “*the conclusion that there has been merely a “cessation” or “suspension” of military activities is wholly inconsistent with a continuous period of 5 years without any evidence at all of activity that could fall within the terms “terrorism” as defined in the Act*”. We would add in the course of argument Counsel for the Appellants additionally submitted that it would be equally fallacious to continue to proscribe based upon an appreciation that the organisation might resume terrorist activity at a wholly uncertain time in the future.
37. In addition, the Notice of Appeal identifies a number of bases for the submissions that the Secretary of State misdirected himself, in law and in fact, in relation to the statutory test, the discretionary factors and in relation to the European Convention on Human Rights.

**(iv) The Secretary of State’s grounds for opposing the appeal.**

38. It is not necessary to set out in detail in this Determination the grounds relied upon by the Secretary of State.

39. Essentially, the Secretary of State's Statement of the Grounds for opposing the Appeal **[1/B7/65]** adopted the reasons set out in the refusal letter (at paragraphs 17 and 47). It was asserted that the Secretary of State "*considered on the basis of the evidence available to him, that the PMOI was concerned in terrorism. This was a conclusion he was entitled to reach*".
40. Further, the Secretary of State asserted (at Paragraphs 16 and 31) that "*The statutory scheme requires a "belief" on the part of the Secretary of State. This is a matter of judgment. The evaluation of the facts relevant to that belief is for the Secretary of state alone .... It follows that it is for the Secretary of State, subject to considerations of Wednesbury unreasonableness, to identify relevant factors and to decide upon the weight, if any, to be afforded to those factors*" and that "*the question for the Commission is not whether it was so concerned but whether the Secretary of State reasonably held the belief that it was, taking account of factors reasonably considered by him to be relevant and according to them such weight (if any) he considered to be appropriate*".
41. It was also positively asserted (at Paragraph 32) that the Secretary of State did have evidence of the PMOI being concerned in terrorism after the Summer of 2001.
42. Finally it was submitted that there was no error in the manner in which the Secretary of State had exercised his discretion.
43. The Appellants requested Further Information in relation to the Decision, and the Secretary of State responded on the 2<sup>nd</sup> May 2007 **[1/B8/80-82]**.
44. We draw attention in particular to Response 2 sub paragraph (iii) **[1/B8/81-82]**, where the Respondent relies upon subparagraphs (b), (c) and (d) of Section 3(5) of the 2000 Act (which is set out in full below).
45. In the course of argument, the Commission invited Counsel for the Respondent to indicate specifically which of the subparagraphs of Section 3(5) of the 2000 Act was relied upon, and the material said to go in support thereof. Counsel submitted that **[Transcript 26<sup>th</sup> July 2007 page 70**

**from line 14, page 82 line 6, 27<sup>th</sup> July 2007 page 64 line 13]** the Commission should look at the matters identified in section 3(5) as a whole, and the Commission was invited to look at the Secretary of State's evaluation of the position as a whole. He told us that he specifically relied on sub-section (c) as amended by section 5(A)(a)(b) of the Terrorism Act 2006. In this regard, he prayed in aid the reporting on occasions during 2002 by the PMOI of youths attacking government property in Iran. This, he asserted, could properly be characterised as "*glorifying*" terrorism and thus amounted to the promotion and encouragement of terrorism by the PMOI (within sub-paragraph (c)).

46. However, at the heart of his submission lay the contention that the Secretary of State was entitled to conclude that the PMOI was "otherwise concerned in terrorism" within the meaning of sub-paragraph (d) of Section 3(5) of the 2000 Act because, although it was not actually committing acts of terrorism, it retained a future will to do so. In effect the Secretary of State's case was that Section 3(5)(d) covers the category of situations such as the present, where the Secretary of State concludes that an organisation that for whatever reason is not actually committing acts of terrorism retains a future will to re-engage in future acts of terrorism if or when future circumstances permit.

## **B. THE ISSUES IN THE APPEAL**

47. The parties have helpfully agreed the principal issues of Law that arise on this appeal. The Agreed Legal Issues are at **[1/A2/20]**. The issues relevant to what we have called the First Stage of the decision are set out below. The issues relevant to the Second Stage are set out at paragraph 351 below.

1. What is the legal test to be applied to the review of a decision of the Secretary of State to refuse to de-proscribe an organisation under section 3(3)(b) of the TA 2000? In particular, is it for the Secretary of State to satisfy POAC that there was material available to him on which he was entitled to believe that the conditions for proscription continue to be fulfilled?
2. What is the proper interpretation of the expressions "prepares for terrorism", "promotes or encourages terrorism" and "is otherwise concerned in terrorism" in section 3(5) of the TA 2000.

3. What is the time at which POAC should consider and assess the Secretary of State's refusal to de-proscribe the PMOI? Is the answer to this question affected by the Appellants' claim that their Convention rights, identified in the Grounds of Appeal, have been interfered with.
4. What is the relevant decision that is subject to challenge on this appeal? (a) Is it the decision to refuse to de-proscribe contained in the letter from the Secretary of State dated 1<sup>st</sup> September 2006; or (b) has the Secretary of State, by the service of Fender 2 dated 8<sup>th</sup> June 2007, taken a new decision to refuse to de-proscribe the PMOI? If the latter has occurred, can that decision be challenged in the present appeal?
5. Does fairness require that (subject to the requirements of national security) before determining an application to de-proscribe, the Secretary of State should put to the Applicants any matters on which he is not satisfied, where such matters arise from: (a) Material included in, or omitted from, the application itself; or (b) Information otherwise available to the Secretary of State upon reasonable enquiry?
6. If the relevant decision for the purposes of this appeal is that contained in the letter dated 1<sup>st</sup> September 2006, was that decision to refuse to de-proscribe the PMOI unlawful on the basis that the facts available to the Secretary of State (and the inferences reasonably to be drawn there from) did not permit a reasonable decision maker [and therefore did not permit the Secretary of State] to conclude that the statutory criteria for proscription set out in section 3(5) of the TA 2000 were satisfied? In particular was there material available to him on which he was entitled to believe that the PMOI (a) prepared for terrorism and/or (b) promoted or encouraged terrorism and/or (c) was otherwise concerned in terrorism? [Further, in reaching his decision, did the Secretary of State have regard to irrelevant considerations, or fail to have regard to relevant considerations?]
7. If the relevant decision for the purpose of this appeal is that contained in the letter dated 1<sup>st</sup> September 2006 are the Appellants permitted (a) to adduce before the POAC evidence of facts existing prior to the decision contained in the Secretary of State's letter of 1<sup>st</sup> September 2006 but not considered by the Secretary of State; and/or (b) to adduce before POAC evidence of the factual position relating to the PMOI between 1<sup>st</sup> September 2006 and the date of the hearing of this appeal?
8. If the relevant decision for the purposes of this appeal is that contained in the letter dated 8<sup>th</sup> June 2007, was that decision to refuse to de-proscribe the PMOI unlawful on the basis that the facts available to the Secretary of State (and the inferences reasonably to be drawn there from) did not permit a reasonable decision maker [and therefore did not permit the Secretary of State] to conclude that the statutory criteria for proscription set out in section 3(5) of the TA 2000 were satisfied? In particular was there material available to him on which he was entitled to believe that the PMOI (a) prepared for terrorism and/or (b) promoted or encouraged terrorism and/or (c) was otherwise concerned in terrorism? [Further, in reaching his decision, did the Secretary of State have regard to irrelevant considerations, or fail to have regard to relevant considerations?]

48. In the light of our conclusions on certain issues it is not necessary for this Commission to reach determinations on all of the agreed issues of law.

49. In relation to the facts, we were provided by the Appellants with factual and procedural chronologies, the former identifying the references in the materials before us which were said to support such facts [1/A4/134]. This was not an agreed document and Counsel for the Respondent provided us with an Annotated Chronology which also identified the references in the materials which were said to support such facts [8/11].
50. Despite the parties' inability to reach agreement (or even disagreement) in relation to the relevant underlying facts, after careful consideration of all of the material available to the Commission, we concluded that the areas of factual dispute were relatively limited and we are satisfied that we are properly able to determine the appeal on the basis of the material available to us.
51. Our determinations in relation to the issues which did arise are set out hereafter.

### **C. THE STATUTORY FRAMEWORK**

52. Parts I and II of the Terrorism Act 2000 as amended provide, in so far as is material, as follows:
1. (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 to intimidate the public or a section of the public, and*
    - (c) *the use or threat is made for the purpose of advancing a political, religious or ideological cause.*
  - (2) *Action falls within this subsection if it-*
    - (a) *involves serious violence against a person,*
    - (b) *involves serious damage to property,*
    - (c) *endangers a person's life, other than that of the person committing the action,*
    - (d) *creates a serious risk to the health or safety of the public or a section of the public, or*
    - (e) *is designed seriously to interfere with or seriously to disrupt an electronic system.*
  - (3) *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.
- ...
- 3.**
- (1) For the purposes of this Act an organisation is proscribed if-
    - (a) it is listed in Schedule 2, or
    - (b) it operates under the same name as an organisation listed in that Schedule.
  - (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.
  - (3) The Secretary of State may by order
    - (a) add an organisation to Schedule 2;
    - (b) remove an organisation from that Schedule;
    - (c) amend that Schedule in some other way.
  - (4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.
  - (5) For the purposes of subsection (4) an organisation is concerned in terrorism if it-
    - (a) commits or participates in acts of terrorism,
    - (b) prepares for terrorism,
    - (c) promotes or encourages terrorism, or
    - (d) is otherwise concerned in terrorism.
  - (5A) The cases in which an organisation promotes or encourages terrorism for the purposes of subsection (5)(c) include any case in which the activities of the organisation –
    - (a) include the glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or
    - (b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.
  - (5B) The glorification of any conduct is unlawful for the purposes of subsection (5A) if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as -
    - (a) conduct that should be emulated in existing circumstances, or
    - (b) conduct that is illustrative of a type of conduct that should be so emulated.
  - (5C) In this section –
    - 'glorification' includes any form of praise or celebration, and cognate expressions are to be construed accordingly;
    - 'statement' includes a communication without words consisting of sounds or images or both.
- ...
- 4.**
- (1) An application may be made to the Secretary of State for the exercise of his power under section 3(3)(b) to remove an organisation from Schedule 2.
  - (2) An application may be made by-
    - (a) the organisation, or
    - (b) any person affected by the organisation's proscription.
  - (3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.
  - (4) The regulations shall, in particular-
    - (a) require the Secretary of State to determine an application within a specified period of time, and
    - (b) require an application to state the grounds on which it is made.
- 5.**
- (1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.
  - (2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.

- (3) *The Commission shall allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.*
  - (4) *Where the Commission allows an appeal under this section by or in respect of an organisation, it may make an order under this subsection.*
  - (5) *Where an order is made under subsection (4) the Secretary of State shall as soon as is reasonably practicable –*
    - (a) *lay before Parliament, in accordance with section 123(4), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or*
    - (b) *make an order removing the organisation from the list in Schedule 2 in pursuance of section 123(5).*
- ...
- 7. (1) *This section applies where-*
    - (a) *an appeal under section 5 has been allowed in respect of an organisation,*
    - (b) *an order has been made under section 3(3)(b) in respect of the organisation in accordance with an order of the Commission under section 5(4) (and, if the order was made in reliance on section 123(5), a resolution has been passed by each House of Parliament under section 123(5)(b)),*
    - (c) *a person has been convicted of an offence in respect of the organisation under any of sections 11 to 13, 15 to 19 and 56, and*
    - (d) *the activity to which the charge referred took place on or after the date of the refusal to deproscribe against which the appeal under section 5 was brought.*
  - (2) *If the person mentioned in subsection (1)(c) was convicted on indictment-*
    - (a) *he may appeal against the conviction to the Court of Appeal, and*
    - (b) *the Court of Appeal shall allow the appeal.*
  - (3) *A person may appeal against a conviction by virtue of subsection (2) whether or not he has already appealed against the conviction.*

**53. The Terrorism Act 2000 created various criminal offences. For present purposes the most relevant ones are sections 11 and 12 which provide as follows:**

- 11 (1) *A person commits an offence if he belongs to or professes to belong to a proscribed organisation,*
- ...
- 12 (1) *A person commits an offence if –*
    - (a) *he invites support for a proscribed organisation, and*
    - (b) *the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).*
  - (2) *A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is –*
    - (a) *to support a proscribed organisation,*
    - (b) *to further the activities of a proscribed organisation, or*
    - (c) *to be addressed by a person who belongs or professes to belong to a proscribed organisation.*
  - (3) *A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.*
  - (4) *Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.*
  - (5) *In subsections (2) to (4) –*

- (a) “meeting” means a meeting of three or more persons, whether or not the public are admitted, and
- (b) a meeting is private if the public are not admitted.

54. Pursuant to section 4(3) of the Act, the Secretary of State made the Proscribed Organisations (Applications for Deproscription etc) Regulations 2006 which, in accordance with section 4(4)(a) of the Act, provided that any application for deproscription had to be determined by the Secretary of State within 90 days beginning with the day after the Secretary of State received the application.

55. Rule 12(1) of the Proscribed Organisations Appeal Commission Rules 2007 provides:

- 12 (1) Where the Secretary of State intends to oppose an appeal, he must file with the Commission a statement of –
- (a) the reasons for the proscription of the organisation;
  - (b) a summary of the evidence in support of those reasons;
  - (c) the evidence on which he relies in opposition to the appeal.

56. We note at this stage that there are in effect two requirements set out in Rule 12(1). The first requirement is that the Secretary of State must explain the reasons for the proscription of the organisation and provide a summary of the evidence that is relied on in support of those reasons. This must be, in our view, an explanation of all of the reasons for the continued proscription. The second requirement is that the Secretary of State must adduce such evidence as he or she relies on in opposition to the particular points raised in the appeal. We will return to this distinction later in our decision.

## **D. GENERAL ISSUES**

### **(i) The Relevant Decision (Issues 3, 4 and 7)**

57. Three “decisions” or three dates were identified by the parties as being of potential relevance: First, the date of the Decision Letter of the 1<sup>st</sup> September 2006; secondly, the date of service by the Respondent of Mr Fender’s second Witness Statement of the 8<sup>th</sup> June 2007; and, thirdly, the date of this

Determination by POAC. The Issues also raised the question of the material time at which POAC should consider and assess the Secretary of State's refusal to de-proscribe and the extent to which material that was not before the Secretary of State (whether because he did not consider it or because it post-dates the relevant decision) can be adduced before POAC.

58. In our judgment it is not necessary for us to resolve these issues on the current appeal. The Respondent accepted that it was necessary to have reasonable grounds for the honest belief that the PMOI "is concerned in terrorism" within the meaning of section 3(4) and (5) of the Act and that POAC is entitled to consider evidence or material that was not before the Secretary of State at the time the decision was made. Although the witness statements submitted by the Appellants in the current appeal came into existence after the 1<sup>st</sup> September 2006 Decision Letter refusing the application to deproscribe the PMOI, with one exception, the evidence relates to events which pre-date that Decision Letter. The one additional fact is that, on the Appellants' case, since September 2006 there has been a further period of time which has elapsed during which the PMOI has continued its non-violent political campaign and has not engaged in any acts which would fall within the definition of being "concerned in terrorism" for the purposes of the Act. This is, however, on the Appellants' case, simply further confirmation of the decision which they contend the PMOI had taken in 2001 to cease all offensive military activities against Iran. As such, Issue 8 does not arise.
59. It follows that, for the purposes of the present appeal, it does not matter which is the relevant decision that is under challenge. Whichever date is chosen of the three contended for, it is accepted by all parties that we can and should have regard to all of the material that is currently before us, although there are, of course, separate arguments as to the approach that we ought to adopt in considering that material and as to whether the decision of the Secretary of State should be judged primarily on the basis of material that was actually available to the Secretary of State at the time the decision was made.

60. We therefore do not express any final conclusion on Issues 3 and 4. Given the extent of argument before us, however, it may assist if we indicate that we would have accepted the Respondent's submission that the statutory scheme leads to the conclusion that the relevant decision was that contained in the letter dated 1st September 2006 refusing the application to deproscribe. It is clear that the decision of the Secretary of State is central to the statutory scheme: it is the Secretary of State who is entrusted with the obligation to consider applications to deproscribe; the appeal to POAC is against this decision not to deproscribe (and not against the decision to proscribe which was made by Parliament). Section 7 of the Act ensures that, if an appeal against the refusal is allowed, with the result that an order is put before Parliament and the organisation is deproscribed, anyone convicted of a relevant offence between the date of the Secretary of State's refusal to deproscribe and the removal of the organisation from Schedule 2, can have their conviction quashed. All of these factors point to the importance in the statutory scheme of the Secretary of State's decision to refuse the application for deproscription.

**(ii) Fairness (Issue 5)**

61. A similar issue was raised in a Preliminary Issues hearing before POAC and was the subject of a Determination by POAC on 15 November 2002 (with reference to the First Appeal). The question then raised was whether the proscription of the PMOI (and another organisation) was unlawful because of a failure to allow the organisation an opportunity to make representations before proscribing it. The Determination of the Commission on that issue was contained in the following paragraphs:

64. We do not accept these submissions. There is no requirement, express or implied in the Act for any organisation to be given the opportunity to make representations before proscription. In the present case the making of the order was a legislative and not a quasi judicial or administrative function, and there is no basis for requiring prior consultation. (See *Bates v Lord Hailsham* [1972] 1 WLR 1373 at 1378). If Parliament intended that there should be consultation prior to proscription we would expect this to be specified.

65. Further, any implication that Parliament intended that there should be consultation prior to proscription with the organisations which the Secretary of State was minded

to include in any draft Order as contended for by the appellants is, in our judgment, clearly negated by the procedure which Parliament has set up for de-proscription and appeal to the Commission. Parliament has devised a detailed procedure (including the creation of the Commission) which provides for the appellants' case to be rigorously scrutinised by the Secretary of State and the Commission within a relatively tight timetable. That structure – focussed as it is on the period after the Order is brought into force – in our view leads to the conclusion that Parliament did not intend any procedural requirements to be implied into the process leading up to the making of the Order.

66. Even if that is not correct, the broader submission made by Lord Lester in oral argument that fairness requires the Secretary of State to consult with the appellants and afford them an opportunity to make representation before deciding to lay the draft Order before Parliament has to be assessed in the context of the statutory scheme that has been created by Parliament – and, of course, in the light of the sensitive nature of the material on which the Secretary of State's decision will be based.

67. As we have already indicated, in our judgment, the “prescribed by law” requirement in Articles 10(2) and 11(2) of the Convention does not require such a procedure to be adopted. Similarly, even if we are wrong in our conclusion at paragraph 65 above, we do not consider that fairness required the Secretary of State to adopt the sort of procedure for which the appellants contend prior to the laying of the draft Order before Parliament. For the reasons we outline below, we consider that the statutory scheme provides for a fair opportunity for the appellants to put their case and for it to be reviewed in detail (if necessary by the Commission as an independent tribunal with powers to ensure that all relevant material is brought before us) in a manner which fairly balances the competing interests that are involved. Although we accept that there will inevitably have been some interference with the Convention rights even if an application for de-proscription or an appeal to this Commission is successful (i.e. the “gap” referred to by Lord Lester), that does not lead to the conclusion that fairness requires the implication of a process of consultation or representations of the type for which the appellants contend before the Order is made.

....

69. We accept that there may be circumstances where the courts, in order to give effect to fundamental human rights, may have to imply reservations or qualifications...But everything depends critically on the nature and the purpose of the enabling legislation and the subject matter with which it is dealing.

70. The subject matter in the present case is the control of terrorism by the mechanism of proscription. It is inevitable that much of the evidence upon which the Secretary of State will act is derived from classified information provided by the Security and Intelligence services. This information cannot be disclosed to the suspect organisation or made available to Parliament, save in broad outline. As such, an effective review of the information can only take place if there is a system akin to the one created by Parliament in the present case as outlined in paragraph 12 above. Moreover while in some cases it may be possible to consult the organisation and listen to their representations before proscription, in the majority it will be impracticable or undesirable. Such organisations frequently have a shadowy existence; it is difficult to identify who may be the appropriate person or body to consult with; and as the appellants recognise it is likely to be pointless and self-defeating to consult with organisations such as Al Qa'ida even if it were possible to do so. In our judgment it is no answer to say that the Secretary of State should adopt the “urgent” procedure in those cases. We do not think that that is the purpose of the emergency procedure.

71. In our judgment the procedure devised by Parliament outlined in the first part of this judgment is probably the best that can be devised to deal with the nature of the subject matter.

72. In any event, it cannot properly be said that some prior consultation is necessary in the interests of fairness. First there is the consideration to be given by Parliament through the affirmative procedure. Secondly there is the process of applying for de-proscription; this can follow very rapidly upon the Order for proscription. It is in our view only a matter of degree as to how difficult it may be to persuade the Secretary of State to change his mind. Prior to proscription, he has at least reached the *prima facie* view that he should include the organisation in the Order. After the Order that *prima facie* view has been publicly affirmed, but he is charged specifically with the duty and responsibility to consider and deal with an application to de-proscribe. That should not be regarded as a pure formality or one that the Secretary of State will not conscientiously discharge. The reasons which he gives for refusing to de-proscribe may be material to be considered on any appeal to the Commission. Third, there is the appeal itself with the Special Advocate procedure enacted in the Act and the Rules. This enables the Commission to consider all the material before the Secretary of State and have the benefit of submissions made upon the confidential material on the appellants' behalf. From the appellant's point of view it may not be as good as being able to make those representations himself or by his Advocate; but that limitation is unavoidable. Moreover although the Commission cannot substitute its opinion for that of the Secretary of State, the scope for review, especially on the question of proportionality and discrimination, does provide an effective remedy to the appellant. Finally, there are the provisions for quashing convictions and paying compensation provided in section 7 of the Act.
73. In our judgment in the light of these features, it cannot sensibly be said that prior consultation is necessary to safeguard the appellants' rights or the interests of fairness. The procedures that have been created by Parliament afford any organisation or individual affected by an Order a fair and effective opportunity to challenge the Secretary of State's initial view and his reasons for refusing to de-proscribe an organisation within a relatively short time after the bringing into force of the Order. Fairness does not require, in our view, additional procedures to be implied into the Act prior to the Order being brought into force.

62. In our judgment, the reasoning in that Preliminary Issues Determination applies with equal force to the submission that the Secretary of State was under an obligation to put to the Applicants for deproscription any matters on which he was not satisfied before making the decision. Parliament provided a detailed procedure (including the creation of POAC) which ensures that the matters raised by the relevant Applicants are scrutinised by the Secretary of State within a relatively tight timetable, followed by the opportunity for a detailed review of the decision and the material supporting it by this Commission. The procedures governing this Commission ensure that the Secretary of State has to explain the reasons for the continued proscription, set out why the matters raised by the Applicants did not lead to the conclusion that the organisation ought to be deproscribed, permit the Appellants to adduce material in support of their case, and require the Secretary of State to disclose all relevant material (i.e. both evidence on which the Secretary of State positively relies and all "exculpatory" material).

63. This, together with the Commission's obligation to satisfy itself that the material available to it enables it properly to determine the appeal (Rule 4 (3)) and the Special Advocate procedure, ensures that the Appellants (with if necessary the assistance of the Special Advocate) and POAC are able properly and thoroughly to address whether or not there were reasonable grounds for the Secretary of State's decision. That is, in our judgment, a fair procedure. Just as the Commission previously concluded that Parliament did not intend any procedural requirements to be implied into the process leading up to the making of the Order, in our view it did not intend any requirement to engage in a consultation process with the Applicants for deproscription. Their safeguard is in their ability to appeal to this Commission and in the requirement imposed by Parliament that provision should be made that decisions are properly reviewed [see Paragraph 5(2)(a) of Schedule 3 to 2000 Act].
64. As such, while it might with the benefit of hindsight have been more satisfactory in this case if, before reaching any decision to refuse the application to deproscribe, the Secretary of State had asked the present Appellants if they had more material available to them on those areas where he was not satisfied and/or had raised issues that concerned him based on the material available to him, we do not believe that he was obliged so to do.

**(iii) The Legal Test (Issues 1 and 2)**

65. Issue 1 as formulated does not completely identify all of the issues relevant to the legal test to be applied.
66. The first question is as to the nature of the duty on the Secretary of State under section 3 of the 2000 Act.
67. It was common ground that, in considering whether to proscribe an organisation and whether or not to deproscribe it, there were two stages to the decision making process. At the first stage, the Secretary of State has, in the

light of all of the relevant evidence, to determine whether he believes that the organisation “is concerned in terrorism” as defined in section 3(4) and (5) of the Act, that is whether the statutory criteria are met (the “First Stage”). It was also common ground that the Secretary of State could only form such an honest belief if he or she had reasonable grounds for that belief.

68. If the Secretary of State holds the reasonable belief that the organisation is concerned in terrorism within the meaning of the Act, then he must consider whether or not the discretion to proscribe should be exercised. Thus, in the event that the First Stage is met, the second stage requires a separate decision whether or not, in the exercise of his or her discretion, the organisation should remain proscribed under the Act (the “Second Stage”).
69. In looking at the two stage test that has to be satisfied at the time of proscription and, subsequently, at any time that an application for deproscription is considered under the 2000 Act, we have considered a wider question as to whether the Secretary of State is under a continuing obligation to consider at reasonable intervals whether an organisation should be deproscribed (in other words, to consider whether the Secretary of State remains of the belief that the organisation is concerned in terrorism and, if so, whether, in the exercise of his or her discretion, it should remain proscribed) irrespective of whether or not an application for deproscription has been made.
70. It is clear from the language of the Act and the nature of the powers with which it is concerned that the Secretary of State is under such a duty. Section 3(3)(b) of the Act enables the Secretary of State to remove an organisation from Schedule 2; the exercise of that power is not dependent on an application for deproscription having been made.
71. Further, under section 3(4) of the Act, the Secretary of State can only make an order to proscribe an organisation if he believes that it *is* concerned in terrorism. The use of the present tense in sections 3(4) and (5) is central to other submissions made by the parties and will be discussed in more detail

below; for present purposes, however, it suffices to note that there is a clear Parliamentary intent that the organisation in question is actually concerned in terrorism at the date of the decision.

72. This reflects a clear legislative intent to criminalise acts which support such organisations, with the inevitable restrictions on the human rights of those who wish to support them, but restricts it to those organisations which currently fall within the definition of being “concerned in terrorism”.
73. In our view that legislative intent applies equally after organisations have been proscribed: it cannot have been Parliament’s intent that an organisation which the Secretary of State historically had reasonable grounds for believing was “concerned in terrorism” (and was properly proscribed) but for which there are no reasonable grounds for believing that it is currently “concerned in terrorism” should remain on Schedule 2 for any longer than absolutely necessary. As such, it is incumbent on the Secretary of State to consider at regular intervals whether or not the power under section 3(3)(b) should be exercised. We were told in the course of argument that the Secretary of State does in fact adopt this practice and that the period between such reviews was around twelve months. We have seen no documentary evidence of such reviews in this case, but it is certainly a practice that the Secretary of State should continue to adopt. It serves to underline our view that such practice is a proper reflection of the Secretary of State’s statutory duty.
74. It follows that an application to deproscribe under section 4 of the Act simply crystallises at a particular point in time the Secretary of State’s continuing duty to consider whether an organisation should remain on Schedule 2. It also means that, when faced with an application to deproscribe, the Secretary of State must not simply focus on the grounds raised by the applicants for deproscription alone in considering whether he or she believes that the organisation is concerned in terrorism and whether or not he or she should exercise the discretion to maintain the organisation as a proscribed organisation.

75. The proper approach is for the Secretary of State to assess *all* of the evidence and material available *including* the application and supporting evidence and all other relevant material available and to answer the two stage question outlined above, namely (1) does he or she believe on reasonable grounds that this organisation is currently “concerned in terrorism” as defined in section 3 of the Act, and (2) if so, in the light of any relevant considerations, should he or she continue to exercise discretion in favour of proscription of the organisation.
76. That is, as we have outlined above, consistent with the terms of the Act and the nature of the Secretary of State’s duty under it and with Rule 12(1) of the Proscribed Organisations Appeal Commission Rules 2007 which requires the Secretary of State to put before POAC the full reasons for his or her proscription of the organisation and a summary of the evidence supporting that conclusion together with any evidence in opposition to the particular grounds and evidence relied on by the Appellants.

**(iv) Review by POAC**

77. The 2000 Act sets out in general terms, and subject always to the General Duties imposed on the Commission, the approach that this Commission must take in considering whether the decision of the Secretary of State was flawed. Pursuant to section 5(3) of the Act, POAC shall allow an appeal against a refusal to deproscribe an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.
78. As we have set out above, it was common ground between the Appellants and the Respondent that the Secretary of State had to have reasonable grounds for believing that the PMOI is concerned in terrorism and that part of POAC’s function is to assess whether the grounds relied on were reasonable in the light of all of the material before it. At that point, however, the parties’ positions diverged.

79. The Appellants contend that, since this is a case involving the Appellants' human rights (and, indeed, the rights of the members of PMOI who are not the current appellants), POAC must adopt a standard of review that is a very much more intensive than the standard *Wednesbury* test, such that a “*close and penetrating examination of the factual justification for the restriction is needed...*”. The Appellants accept that POAC cannot properly substitute its own decision for that of the Secretary of State, but they contend that POAC is required to scrutinise the decision to ensure that, among other things, there has been an “*acceptable assessment of the facts*”. As the Appellants said in paragraph 9 of their written Note on the Approach to Disputed Facts:

“*Wednesbury* requires only that POAC ask whether there was material on which the Secretary of State could reasonably conclude that PMOI killed a bystander which would not meet the enhanced scrutiny test. A full merits test – for which the Appellants do not contend – would require POAC to decide for itself whether PMOI killed a bystander. Intense or heightened scrutiny must sit somewhere between these two extremes if judicial statements of heightened scrutiny are to mean anything. The test the Appellants propose is as follows: “Looking at all the evidence which was or could have been made available, was it reasonable for the Secretary of State to conclude that PMOI killed a bystander [or has the Secretary of State demonstrated that it was reasonable so to conclude]?”

80. Further, the Appellants contend that the enhanced scrutiny requirement applies to both the First and Second Stages of the decision making process.

81. Finally, as is referred to in more detail below, Counsel for the Appellants submitted that any assessment of the activities of the PMOI prior to the Act being enacted should not be seen through the forensic spectacles of the very wide definition of “terrorism” and being “concerned in terrorism” that was enacted in the Act.

82. Counsel for the Respondent took a markedly different approach. His submission was that it was only at the Second Stage (i.e. the exercise of the discretion) that enhanced scrutiny review was required. It was submitted that unless and until the Secretary of State decided to exercise his or her discretion in favour of continued proscription, there is no relevant

interference with the human rights of the Appellants (or indeed the members of the PMOI). As such, he contended that, to the extent there was a requirement for “enhanced scrutiny” of the decision, this only applied to the materials relevant to the Second Stage. It followed, according to his submission, that at the First Stage the decision was subject to the ordinary Wednesbury test. Further, in relation to both stages, he contended that POAC should show very considerable deference to the assessment of the Secretary of State because the issues that had to be considered (broadly described as national security, assessment of terrorist activity and foreign policy), were all matters which, on authority and for good reason, were ones which the Courts recognised were for the Executive to determine and assess. This was illustrated in particular by the considerations at Second Stage which were largely foreign policy issues.

83. Counsel for the Respondent accepted that POAC *could* have regard to evidence that was not before the relevant decision maker at the time the decision was made, adding the following note of caution in paragraph 35 of his written submissions:

“...However as a simple issue of relevance it should be concluded that the legality of the Secretary of State’s decision to maintain proscription of PMOI should be judged, primarily, on the basis of material available to the Secretary of State [at the time he made the decision to refuse the application for deproscription]...Thus, in view of the fact that its function is to review the decision of the Secretary of State, POAC should take a cautious approach to the relevance of and weight to be attached to evidence which, reasonably, was not before the Secretary of State at the relevant time.”

84. Counsel for the Respondent emphasised that there was no limit on the number of applications for deproscription that could be made. As such, he submitted that if there was any relevant evidence which was not before the Secretary of State which had come to light during the course of the proceedings before this Commission, the appropriate course should be for the Appellants to make a further application for deproscription, rather than for POAC to place much (if any) reliance on such evidence in reviewing the decision of the Secretary of State.

85. Both parties relied on a number of authorities in support of their respective cases; indeed, in many cases the Appellants and the Secretary of State relied on the same authorities for diametrically opposite propositions, thereby illustrating the difficulties which face tribunals and Courts who have to interpret and implement the often opaque guidance that is available as to the appropriate standard and intensity of review in cases such as this.
86. The Special Immigration Appeals Commission (“SIAC”) exercises a statutory jurisdiction that in many respects is analogous to that of POAC. In *A and Others v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414, the Court of Appeal heard the appeals of ten persons following their unsuccessful challenge before SIAC to certificates issued by the Secretary of State that they were persons whose presence in the United Kingdom he believed to be a threat to national security and that he suspected them of being terrorists. All ten of the Appellants had been detained as a result of the issue of such certificates. The Appellants were unsuccessful before the Court of Appeal. An appeal was pursued to the House of Lords on grounds that are not relevant to the present appeal.
87. It is important to note that the Court of Appeal in *A* was concerned with the provisions of Part 4 of the Anti-terrorism, Crime and Security Act 2001 which is in different terms to Parts I and II of the 2000 Act. In particular, section 16(2) of Anti-terrorism, Crime and Security Act 2001 provides that:
- On appeal [SIAC] must cancel the certificate if (a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the certificate should not have been issued.*
88. This is to be contrasted with the jurisdiction of POAC as set out in section 5(3) of the Act. However, as Counsel for the Respondent properly accepted during submissions, in practice the exercise being undertaken by SIAC and POAC is very similar. In particular, as we have set out above, he accepted that POAC must determine whether or not the Secretary of State had reasonable grounds for believing that the PMOI “is concerned in terrorism”. As such, as he also accepted during the course of submissions, helpful guidance can be found as

to the approach that POAC should take to the review of the evidence from the decision in A.

89. All three members of the Court of Appeal gave Judgments. Pill LJ introduced the relevant submissions of the Appellants at paragraphs 28 to 30 of the Judgment:

*Insufficient scrutiny*

28 The detainees' first submission, and the oral submission made by Mr Gill, is that the commission erred in affording an insufficient standard of scrutiny for the certification and detention of the detainees. Having regard to the fundamental importance of the right to liberty and security of person and to the prospect of indefinite detention inherent in Part 4 of the 2001 Act, a very high standard is required to be applied when scrutinising the issue of a certificate under section 21 of the Act, it was submitted.

29 The test to be applied by the Secretary of State in deciding whether to issue a certificate is that provided in section 21(1) of the 2001 Act.

30 The subsection requires that the Secretary of State has a belief (section 21(1)(a)), and a suspicion: section 21(1)(b). A reasonable belief can exist only on the basis of information received and the existence of a reasonable suspicion depends on an assessment of that information. A reasonable belief may be held on the basis of the receipt of information which has not been proved in the ordinary sense of that word. Suspicion may reasonably arise from unproved facts.

90. Following citation from Rehman, Pill LJ set out SIAC's own directions as to the approach which it ought to take (which, as is set out below, the Court accepted as disclosing no error of law):

35 Mr Gill submitted that the underlying principle to be applied in approaching section 21(1) is the principle that the Secretary of State must not act in an arbitrary way. There are different levels of suspicion and, in the present context, a high level is required, it was submitted. Substantial investigation is required before a suspicion can be a reasonable suspicion.

36 The commission accepted, at para 46, that

"the extent, nature, independence and reliability of the evidence are relevant. The extent to which obvious lines of inquiry, which could have been followed, have been ignored is relevant ... It is all the circumstances which are relevant".

The commission accepted, at para 48, that the evidence

"does have to be scrutinised carefully and its weaknesses and gaps examined to see if it does provide such grounds [the statutory grounds] or whether suspicion exists or survives because of a failure to investigate matters in obvious ways which would have cast a clearer light, one way or the other, on the point".

37 The commission stated, at para 49:

"What weight is attached to any particular piece of evidence is a matter for consideration in any particular case in the light of all the evidence, viewed as a whole and not as isolated pieces ... Whilst the absence of arrest on criminal charges or interview can be an indicator as to the existence of reasonable grounds, it must be remembered both what material is admissible for these purposes and inadmissible or not usable for criminal trial purposes, and the nature of the matters in respect of which reasonable grounds for suspicion or belief has to be shown."

**38** The commission stated, at para 51:

"By the nature of their habitual tasks they [the police or the security services] deal with suspicion and risk rather than proof. They acknowledge 'that there may be a gap between a seemingly suspicious activity and it giving reasonable grounds for suspicion in this context which cannot be filled by inference or assessment where it could verily be filled by further investigation'."

**39** The commission stated, at para 58:

"It would equally make a nonsense of the Act, in relation to the grounds for belief that a detainee was a risk to national security, to require specific factual allegations to be proved on a balance of probabilities before account could be taken of them in a risk assessment or before they could afford reasonable grounds for the necessary belief."

**40** Dealing with the role of the Secretary of State's views and the concept of deference, the commission stated, at para 63:

"The judiciary had to be willing to put an appropriate degree of trust in the ability of Ministers who are publicly accountable to satisfy themselves as to the integrity and professionalism of the security service."

**41** The commission stated, at para 61:

"It is plain that the commission has to be satisfied as to the existence of reasonable grounds for suspicion and belief for the section 25 appeals by taking account of all matters even if not proved on the balance of probability; the *Rehman* decision is of no assistance to the detainees in that context."

**42** The commission stated, at para 71:

"It is our task under section 25 to examine the evidence relied on by the Secretary of State and to test whether it affords us reasonable grounds for the relevant belief and suspicion; it is not a demanding standard for the Secretary of State to meet ... The commission must be careful to ensure that such deference or recognition of expertise as is appropriate does not mean that it forswears its own obligation to be satisfied that there are indeed reasonable grounds for the necessary belief and suspicion."

In the *Rehman* case [2003] 1 AC 153 it was accepted that the Secretary of State's assessment of whether, on a given state of facts, a person's presence is a risk to national security is entitled to considerable deference: Lord Slynn, at p 184, para 26; Lord Hoffmann, at p 193, para 54.

**43** Mr Gill submitted that the commission have applied too low a test. They have relieved the Secretary of State of any burden of establishing facts underlying the suspicions and beliefs. They have regarded a speculative state of mind of conjecture or surmise as sufficient. A rigorous, disciplined and structured approach is required of the commission, it was submitted. Otherwise the Secretary of State has too great a room for manoeuvre. To place a limit on the power of the executive to deprive a person of liberty, an analysis of the reasonableness of the Secretary of State's conduct is required. While citing it, the commission failed to apply the

principle stated by the European Court of Human Rights in *Murray v United Kingdom* (1994) 19 EHRR 193, 225, para 56: "The length of deprivation of liberty at risk may also be material to the level of suspicion required." The highest level of suspicion was required and exacting standards should have been applied, it was submitted. An approach culminating in the statement that "it is not a demanding standard for the Secretary of State to meet" was in error.

**44** It is the impossibility of removing people lawfully which creates the need for the derogation and the 2001 Act. What would otherwise be a breach of article 5 is rendered lawful by Part 4 of the 2001 Act but, in each case, it must be shown that certification is a strictly necessary measure by way of response to the emergency threatening the life of the nation. That confirms the need for extremely anxious scrutiny when section 21 powers are exercised, it was submitted.

## **91. Pill LJ then concluded:**

**45** The task of the commission is to assess whether it considers that there are or are not reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b): section 25(2) of the 2001 Act. It is not necessary for present purposes to consider the effect of section 25(2)(b), which empowers the commission to discharge the certificate on grounds other than that reasonable grounds for a belief or suspicion are not present, save to recall the additional power to discharge conferred on the commission.

**46** In *M v Secretary of State for the Home Department* [2004] 2 All ER 863 the Secretary of State sought to challenge a finding of the commission that the issue of a certificate was not justified. Lord Woolf CJ analysed the task of the commission, at pp 868-869:

"15. SIAC's task is not to review or 'second-guess' the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in section 25 of the 2001 Act. The task of this court on an appeal is limited to questions of law. However, the power of this court to determine questions of law enables the court (among other grounds) to set aside a decision of SIAC if that decision is unsupported by any evidence or if it is a decision to which a tribunal cannot properly come on that evidence so that it is perverse.

"16. SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances."

**47** Having considered the facts Lord Woolf CJ stated, at p 873, para 33:

"What is critical was the value judgment which SIAC had to make as to whether there was reasonable ground for the belief or suspicion required. As to this question SIAC was the body qualified by experience to make a judgment. SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law."

The commission's approach was then approved. However, it was submitted that the commission in the generic judgment failed to apply that test when stating, at para 40:

"It is a possibility that the commission could conclude that there were reasonable grounds for the suspicion or belief without itself holding the requisite suspicion or belief. But its task under section 25 is to consider the reasonableness of the grounds rather than to cancel a certificate if, notwithstanding the reasonableness of the grounds, it were unable subjectively to entertain the suspicion or hold the belief to which the statute refers. If such a situation were to arise, the commission will make that clear."

The situation did not in the event arise.

**48** The commission did not have the advantage of the decision of this court in *M's* case [2004] 2 All ER 863 where its approach was generally approved. I do not consider the approach in para 40 to be inconsistent with *M's* case. The commission was correct to raise the possibility that a certificate need not be cancelled if the commission was unable itself to entertain the relevant suspicion or hold the relevant belief while at the same time, making the appropriate value judgment, holding that there were reasonable grounds for the suspicion and belief.

**49** Reading the relevant part of the judgment as a whole, I am not persuaded that the commission applied the wrong test under section 25(2)(a) or in its consideration of section 21(1) powers. The members approached the evidence on the correct basis. I regard the expression "not a demanding standard" in para 71 as unfortunate but in using it, the commission were in my view, making a comparison with standards by which facts are proved in judicial proceedings and were not departing from the statutory test. They wished to emphasise that the standard is a different one from that applied in ordinary litigation which is routinely concerned with finding facts. The context is different but, as Lord Hoffmann stated in *Rehman's* case [2003] 1 AC 153, 194: "it is a question of evaluation and judgment" and "the concept of a standard of proof is not particularly helpful". All the circumstances must be considered and, while in some situations specific acts must be proved, what matters is the "assessment made of the whole picture".

**50** In their conclusions the commission stated, at para 253:

"Individual pieces [of intelligence or assessment] in isolation might be said to show little or nothing but should not then individually be laid aside and ignored. They should be looked at in the light of all the evidence; the individual pieces may then be seen to be part of a wider picture or to show a consistent pattern of significance. Likewise, we accept that a close and penetrating analysis of the material including the assessments and inferences is required, as the detainees' advocates submitted".

**51** The overall fairness of proceedings before the commission was considered by Lord Woolf CJ in *A's* case [2004] QB 335, 364, para 57:

"The proceedings before the commission involve departures from some of the requirements of article 6. However, having regard to the issues to be inquired into, the proceedings are as fair as could reasonably be achieved. It is true that the detainees and their lawyers do not have the opportunity of examining the closed material. However, the use of separate counsel to act on their behalf in relation to the closed evidence provides a substantial degree of protection. In addition, in deciding upon whether there has been compliance with article 6 it is necessary to look at the proceedings as a whole (including the appeal before this court). When this is done and the exception in relation to national security, referred to in article 6, is given due weight, I am satisfied there is no contravention of that article."

**52** I find no error of approach.

## 92. Laws LJ reached similar conclusions:

### *The scrutiny issue*

**223** Earlier I characterised Mr Gill's submission on this issue as being to the effect "that SIAC applied an insufficiently rigorous standard of scrutiny, of the facts and of the Secretary of State's case, in the exercise of its appellate function under section 25 of the 2001 Act". That was I hope a convenient summary. However on the face of it the argument, certainly as articulated in Mr Gill's skeleton, contains a number of different strands; but they are extremely repetitive. Thus it is said that the grounds for belief and suspicion under sections 21 and 25 must point "unequivocally and strongly to the conclusion" that the person in question is an international terrorist and a risk to national security. Then exception is taken to SIAC's comment in para 71 of the open generic judgment that [the test for reasonable grounds for the relevant belief and suspicion] "is not a demanding standard for the Secretary of State to meet". Mr Gill submitted by contrast that the Secretary of State must in fact meet a very demanding or exacting standard. Then it is said that where the case is not urgent, the test for reasonable belief and suspicion must be the more stringent, there being more scope for the Secretary of State to investigate the circumstances. Mr Gill reminded us that C had been under investigation for many months and D since February 1999. Next it was submitted that the powers granted are so intrusive as to require "an extremely strong basis for suspicion". Next, that suspicion must be based on the establishment of objective and verifiable facts, so that there is more than a *prima facie* case of the kind required in the law of crime to justify the detention of a suspect before charge.

**224** I was not assisted by these repetitive arguments. It is axiomatic that a power of executive detention on grounds of no more than belief and suspicion-albeit reasonable belief and suspicion-is on its face grossly antithetical to established constitutional rights. Our task is to construe Part 4 of the 2001 Act so as to ascertain the nature of the power conferred by section 21, and by the same token the scope of SIAC's function under section 25(2). That requires some consideration of the policy and objects of the Act, to which I have already referred, and also as it seems to me the checks and balances for which, given the draconian powers of section 21, the 2001 Act itself provides: not only the right of appeal to SIAC but also the provisions for review in individual cases under section 26, the requirement for review of the operation of sections 21 to 23 under section 28, and the "sunset" clause provided in section 29. But we were not assisted by any developed submissions on these matters.

**225** Mr Gill advanced two concrete submissions. The first was that where past facts are relied on by the Secretary of State to establish a reasonable suspicion that an individual is a terrorist within section 21, then on an appeal to SIAC the Secretary of State must prove the facts alleged "to a high degree of probability or at least on balance of probabilities". For this proposition Mr Gill relied on the decision of their Lordships' House in [\*Secretary of State for the Home Department v Rehman\*](#) [2003] 1 AC 153. The second concrete submission was that in assessing risk to national security under section 25, SIAC should have paid less deference to the views of the Secretary of State (in essence, the views of the security service) than in fact it did. For this proposition Mr Gill sought to distinguish the *Rehman* case.

...

**229** I will first address Mr Gill's submission that where past facts are relied on by the Secretary of State to establish a reasonable suspicion that an individual is a terrorist within section 21, then on an appeal to SIAC the Secretary of State must prove the facts alleged "to a high degree of probability or at least on balance of probabilities". The starting-point must be the language of the statute. It seems to me that the structure of section 21(1) repays close attention. Two states of mind are required of the Secretary of State if he is to issue a lawful certificate: a reasonable *belief* in a *risk* and a reasonable *suspicion* of a *fact*. Belief and suspicion are not the same, though both are less than knowledge. Belief is a state of mind by which the person in question thinks that X *is* the case. Suspicion is a state of mind by which the person in question thinks that X *may be* the case. Now, the risk to national security referred to in section 21(1)(a) is a matter of evaluation; the Secretary of State must reasonably believe that the risk is correctly evaluated. But when in section 21(1)(b) the statute confronts fact rather than evaluation, a lesser state of mind is required; the Secretary of State must

reasonably suspect that A is a terrorist, that is, he must reasonably think that A may be a terrorist. This alignment of belief with evaluation and 'suspicion with fact, which is plainly carried through to the appeal provision contained in section 25, must have been arrived at advisedly. No doubt it was driven by the nature of the subject matter. The assessment of the question whether a person is a terrorist within the meaning of section 21(2) will most likely depend on intelligence-the pieces of an often incomplete jigsaw puzzle-rather than hard evidence. Accordingly it will be difficult or impossible to get any further than suspicion.

**230** These considerations possess, in my judgment, two consequences for Mr Gill's argument. First, while it would have been hard enough to find a requirement of proof of facts had the statute said in section 21(1)(b) "*believes* that the person is a terrorist", it is certainly impossible to do so faced with a requirement of suspicion only. Mr Gill's submission is hopelessly founded on the language of the Act. As for his reliance on the [Rehman](#) case [2003] 1 AC 153, it is important to have in mind with respect that *Rehman* did not at all engage Part 4 of the 2001 Act, which was not on the statute book at the time of the Secretary of State's decision or SIAC's judgment on appeal in that case. Their Lordships were dealing with the deportation provisions contained in the Immigration Act 1971 which have no analogue to section 21. Moreover, while I of course acknowledge Lord Slynn's reference, at pp 183-184, para 22, to the need to prove specific past acts relied on, the central place of evaluation in a security context received much emphasis from their Lordships.

**231** The second impact upon Mr Gill's argument arising from these considerations of the choice of language in the Act is this. The nature of the subject matter is such that it will as I have indicated very often, usually, be impossible to prove the past facts which make the case that A is a terrorist. Accordingly a requirement of proof will frustrate the policy and objects of the Act. Now, it will at once be obvious that the derogation issue and the scrutiny issue run together here. In dealing with the former I have already said that the legislature's choice of belief and suspicion as the test for certification and thus detention tends to support the view that the target of the Act's policy includes those who belong to loose, amorphous, unorganised groups. So it does; the choice is apt to strike the target. Proof would not be. Just as Mr Gill's submission misdescribes the Act's policy and objects, so it misdescribes the mechanisms provided for their achievement.

....

**235** In the present case, the requirement that the belief and suspicion must be reasonable is in my judgment very important, especially at the section 25 appeal stage. It means that the appeal is no mere *Wednesbury* exercise: [Associated Provincial Picture Houses Ltd v Wednesbury Corpn](#) [1948] 1 KB 223. SIAC has a substantial task on the merits, to assess the presence or absence of reasonable grounds for the relevant suspicion and belief. It is plain that SIAC recognised this, and its detailed and meticulous treatment of the evidence, open and closed, testifies as much. The fact of a substantial, meaningful right of appeal to a senior independent court marks the legislature's respect for the first constitutional fundamental, the abhorrence of executive detention. So do the carefully structured procedures for the deployment of special advocates. Further, I attach no little importance to the other protections which I have summarised: the provisions for review in individual cases under section 26, the requirement for review of the operation of sections 21 to 23 under section 28, and the "sunset" clause provided in section 29. In this connection I have had in mind the observations of Lord Woolf CJ, set out in his judgment in [A v Secretary of State for the Home Department](#) [2004] QB 335, 365, paras 60 to 62 concerning the reasoned opinion given by the Commissioner for Human Rights on aspects of the United Kingdom's derogation from article 5. I need not, with respect, set out these materials.

**236** In my judgment the 2001 Act provides for a reasonable balance between the constitutional fundamentals I have discussed. In those circumstances there is no cause to adopt a strained and artificial construction of the critical provisions in the Act, even if (which I greatly doubt) there were any legitimate scope to do so. This conclusion is, I think, supported by these observations of Lord Woolf CJ in *M v Secretary of State for the Home Department* [2004] 2 All ER 863, 868-869:

"16. SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances."

**93. Neuberger LJ also reached similar conclusions:**

**367** When considering whether there are reasonable grounds under section 25(2)(a), SIAC must approach the evidence with great care, bearing in mind, in a detainee's favour, the draconian consequences of upholding a section 21 certificate, but also bearing in mind the difficulty which would normally be involved in establishing that a detainee is a terrorist or a threat. It appears to me, from reading the very full consideration given by SIAC to the evidence adduced by and against each of the detainees, and the care with which the evidence was assessed and the explanation for the conclusions arrived at, that it cannot be suggested that SIAC did not adopt an appropriate approach to each of the appeals. Indeed, as mentioned already, I believe that SIAC performed its difficult and worrying task in an exemplary fashion.

...

**370** In these circumstances I think that there are two problems with the detainees' criticism that SIAC failed to apply a proper standard of proof. The first is that, in deciding whether there are as a matter of fact reasonable grounds for suspicion or belief, SIAC is not necessarily concerned with primary facts, and, to that extent there is no need to establish a primary fact on the balance of probabilities. For instance, subject to consideration of its reliability (which may raise all sorts of factors) a newspaper report relating to the activities of a detainee may be taken into account by the Secretary of State under section 21 or by SIAC under section 25. In such a case it is not necessary for SIAC to be satisfied on the balance of probabilities that the reported facts are true; it would merely need to be satisfied, on the balance of probabilities, as to the existence of the newspaper report. (I should emphasise that SIAC may, even if so satisfied, give no or little weight to the contents of the newspaper report if it thought it right to do so.) Secondly, when considering whether there are reasonable grounds for the relevant belief or suspicion, SIAC need not, as I have sought to explain, be concerned about satisfying itself that on the balance of probabilities the belief for suspicion is justified, or that it shares the belief or suspicion. It is merely concerned with deciding whether there are reasonable grounds for such belief or suspicion.

**371** The question of whether someone is an international terrorist can be said to be a matter of fact, whereas the question of whether he is a threat to national security is itself a matter of assessment. However, the question of whether there are reasonable grounds for suspecting a person is a terrorist and believing he is a threat to national security is a question of assessment.

**94. Both the Appellants and the Secretary of State also relied on the Judgment of the Court of Appeal in Secretary of State for the Home Department v MB [2007] QB 415. MB concerned an application to the Court by the Home Secretary under section 3(1)(a) of the Prevention of Terrorism Act 2005 for permission to make a control order against MB, a British citizen, in order to prevent him travelling to Iraq to fight against British and other coalition**

forces. The Judge at first instance ordered that the control order should remain in force but granted a declaration, pursuant to section 4(2) of the Human Rights Act 1998, that the procedures under section 3 of the Terrorism Act 2005 were incompatible with MB's right to a fair hearing under Article 6(1) of the Convention on a number of grounds, namely: the only function that the court was permitted to perform was to consider whether, at the time that the Home Secretary's decision was made and on the material that was then before him, the decision to make the order was flawed; the court only had power to review the Home Secretary's decision rather than form its own view on the merits; in performing that function, the court had to apply a particularly low standard of proof; and the court reached its decision on the basis of, amongst other things, closed material of which MB was unaware and therefore could not controvert. The Home Secretary appealed and the Court of Appeal reversed the decision of the Judge.

95. The relevant statutory sections were set out in paragraphs 9 and 12 of the Judgment of Lord Phillips of Worth Maltravers CJ who gave the Judgment of the Court:

**9** Section 2 of the PTA deals with the making of non-derogating control orders. Subsection (1) provides that:

"The Secretary of State may make a control order against an individual if he-(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

...

**12** The court's supervisory role in relation to a non-derogating control order is set out in section 3 of the PTA. The relevant provisions are as follows:

"(1) The Secretary of State must not make a non-derogating control order against an individual except where-(a) having decided that there are grounds to make such an order against that individual, he has applied to the court for permission to make the order and has been granted that permission ...

"(2) Where the Secretary of State makes an application for permission to make a non-derogating control order against an individual, the application must set out the order for which he seeks permission and-(a) the function of the court is to consider whether the Secretary of State's decision that there are grounds to make that order is obviously flawed; (b) the court may give that permission unless it determines that the decision is obviously flawed; and (c) if it gives permission, the court must give

directions for a hearing in relation to the order as soon as reasonably practicable after it is made ..."

...

"(10) On a hearing in pursuance of directions under subsection (2)(c) ... the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed-(a) his decision that the requirements of section 2(1)(a) and (b) were satisfied for the making of the order; and (b) his decisions on the imposition of each of the obligations imposed by the order.

"(11) In determining-(a) what constitutes a flawed decision for the purposes of subsection (2) ... or (b) the matters mentioned in subsection (10), the court must apply the principles applicable on an application for judicial review.

"(12) If the court determines, on a hearing in pursuance of directions under subsection (2)(c) ... that a decision of the Secretary of State was flawed, its only powers are-(a) power to quash the order; (b) power to quash one or more obligations imposed by the order; and (c) power to give directions to the Secretary of State for the revocation of the order or for the modification of the obligations it imposes.

**96. Counsel for the Appellants drew attention to the following paragraphs 55 to 60 in the Judgment under the heading “*The Standard of Review*”. For completeness, we have included up to paragraph 65 of the Judgment because the later paragraphs indicate how the extent of the deference to be shown by a Court to the Secretary of State alters according to the nature of the particular material or subject matter under review:**

**55** Mr Burnett challenged this submission. He submitted that the Secretary of State's decision was essentially an executive decision governed by public law and that article 6 was only engaged because the decision incidentally had the effect of determining civil rights. The Secretary of State was the decision maker and the role of the court was to review the legality of his decision, according him a substantial measure of discretion having regard to the fact that the subject matter of the decision was national security. Mr Burnett relied upon [Bryan v United Kingdom](#) (1995) 21 EHRR 342, as reviewed by the House of Lords in [R \(Alconbury Developments Ltd\) v Secretary of State for the Environment, Transport and the Regions](#) [2003] 2 AC 295 and [Runa Begum v Tower Hamlets London Borough Council](#) [2003] 2 AC 430 as supporting what he described as "the composite approach" to the requirements of article 6.

**56** The subject matter of these decisions, namely planning control, was very different from that with which this appeal is concerned. None the less, we agree with Mr Burnett that the reasoning in those cases is relevant in the present context. In the latter two cases the House of Lords, and Lord Hoffmann in particular, drew attention to the distinction between a finding of fact and a decision which turns on a question of policy or expediency. So far as the former is concerned, article 6 may require the factual evaluation to be carried out by a judicial officer. So far as the latter is concerned, the role of the court may be no more than reviewing the fairness and legality of the administrator to whom Parliament has entrusted the policy decision. Lord Hoffmann identified a finding of a breach of the criminal law as a "paradigm example" of a finding of fact requiring judicial determination in order to comply with article 6: see [Runa Begum](#) , at para 42. Mr Starmer seized on this comment as being directly

applicable to the finding that the subject of a control order is or has been involved in terrorism-related activity.

**57** There are two elements in the decision of the Secretary of State to make a non-derogating control order. First he must have reasonable grounds for suspecting that the controlled person is or has been involved in terrorist-related activity. Secondly he must consider that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make the order. The first element involves an assessment of fact. The second element requires a value judgment as to what is necessary by way of protection of the public.

**58** Section 3(10)(a) of the PTA requires the court to consider whether the decision of the Secretary of State that there were reasonable grounds for suspecting that the subject of the order was involved in terrorism-related activity was flawed. Involvement in terrorist-related activity, as defined by section 1(9) of the PTA, is likely to constitute a serious criminal offence, although it will not necessarily do so. This, of itself, suggests that when reviewing a decision by the Secretary of State to make a control order, the court must make up its own mind as to whether there are reasonable grounds for the necessary suspicion. Indeed, as we put to Mr Starmer in argument, it is not easy to see what alternative approach the court could take.

**59** The test of reasonable suspicion is one with which the Strasbourg court is familiar in the context of article 5(1)(c) of the Convention.

"Having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence": [Fox, Campbell and Hartley v United Kingdom](#) (1990) 13 EHRR 157, para 32.

**60** Whether there are reasonable grounds for suspicion is an objective question of fact. We cannot see how the court can review the decision of the Secretary of State without itself deciding whether the facts relied upon by the Secretary of State amount to reasonable grounds for suspecting that the subject of the control order is or has been involved in terrorism-related activity. Thus far we accept Mr Starmer's submission as to the standard of the review that must be carried out by the court.

**61** Somewhat different considerations apply in respect of the second element in the Secretary of State's decision. Section 3(10) requires the court to review the decision of the Secretary of State that it was necessary, for purposes connected with protecting the public from a risk of terrorism, to make the control order. The court is further required to consider his decision on each one of the obligations.

**62** Section 1(9) throws some further light on the object of the control order. As one might expect, it is to prevent or restrict the controlled person from involvement in terrorism-related activity.

**63** Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity. The obligations that it is necessary to impose may depend upon the nature of the involvement in terrorism-related activities of which he is suspected. They may also depend upon the resources available to the Secretary of State and the demands on those resources. They may depend on arrangements that are in place, or that can be put in place, for surveillance.

**64** The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State. That it is appropriate to accord such deference in matters relating to state security has long been recognised, both by the courts of this country and by the Strasbourg court, see for instance:

Secretary of State for the Home Department v Rehman [2003] 1 AC 153; Ireland v United Kingdom (1978) 2 EHRR 25.

65 Notwithstanding such deference there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so. The exercise has something in common with the familiar one of fixing conditions of bail. Some obligations may be particularly onerous or intrusive and, in such cases, the court should explore alternative means of achieving the same result. The provision of section 7(2) for modification of a control order "with the consent of the controlled person" envisages dialogue between those acting for the Secretary of State and the controlled person, and this is likely to be appropriate, with the assistance of the court, at the stage that the court is considering the necessity for the individual obligations.

97. In addition, Counsel for the Respondent drew attention to paragraph 67 of the Judgment, under the heading "*The standard of proof*":

67 We consider that in these passages the judge is confusing substance, relevant to the substantive articles of the Convention, and procedure, relevant to article 6. The PTA authorises the imposition of obligations where there are reasonable grounds for suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof. It is the procedure for determining whether reasonable grounds for suspicion exist that has to be fair if article 6 is to be satisfied.

98. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, the House of Lords was concerned with a challenge to the decision of the Secretary of State to refuse an application for indefinite leave to remain and to deport the applicant because his association with an organisation involved in terrorist activities on the Indian subcontinent meant that the making of such an order was conducive to the public good in the interests of national security. Counsel for the Respondent relied on this case to demonstrate that the approach urged on us on behalf of the Appellants, namely to look at each relevant fact and ask whether on the preponderance of the evidence, the Secretary of State had reasonable grounds for the belief that he did is incorrect, as well as to illustrate the degree of deference afforded by the Courts to the Secretary of State in an analogous decision making role. He particularly drew attention to paragraph 26 in the speech of Lord Slynn of Hadley and paragraphs 28, 29 and 31 in the speech of Lord Steyn:

**26** In conclusion even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him...

...

**28** Section 15(3) of the Immigration Act 1971 contemplated deportation of a person in three situations, viz where "his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature". The Commission thought that section 15(3) should be interpreted disjunctively. In the Court of Appeal Lord Woolf MR explained, ante, p 167, para 40 that while it is correct that these situations are alternatives "there is clearly room for there to be an overlap". I agree. Addressing directly the issue whether the conduct must be targeted against the security of this country, Lord Woolf MR observed, at p 165, para 34:

"Whatever may have been the position in the past, increasingly the security of one country is dependent upon the security of other countries. That is why this country has entered into numerous alliances. They acknowledge the extent to which this country's security is dependent upon the security of other countries. The establishment of NATO is but a reflection of this reality. An attack on an ally can undermine the security of this country."

Later in his judgment, at p 167, para 40, Lord Woolf MR said that the Government "is perfectly entitled to treat any undermining of its policy to protect this country from international terrorism as being contrary to the security interests of this country". I respectfully agree. Even democracies are entitled to protect themselves, *and* the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies. This broader context is the backcloth of the Secretary of State's statutory power of deportation in the interests of national security.

**29** That brings me to the next issue. Counsel for the appellant submitted that the civil standard of proof is applicable to the Secretary of State and to the Commission. This argument necessarily involves the proposition that even if the Secretary of State is fully entitled to be satisfied on the materials before him that the person concerned *may* be a real threat to national security, the Secretary of State may not deport him. That cannot be right. The task of the Secretary of State is to evaluate risks in respect of the interests of national security. Lord Woolf MR expressed the point with precision as follows, at p 168, para 44:

"in any national security case the Secretary of State is entitled to make a decision to deport not only on the basis that the individual has in fact endangered national security but that he is a *danger* to national security. When the case is being put in this way, it is necessary not to look only at the individual allegations and ask whether they have been proved. It is also necessary to examine the case as a whole against an individual and then ask whether on a global approach that individual is a danger to national security, taking into account the executive's policy with regard to national security. When this is done, the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion. Here it is important to remember that the individual is still subject to immigration control. He is not in the same position as a British citizen. He has not been charged with a specific criminal offence. It is the danger which he constitutes to national security which is to be balanced against his own personal interests."

The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis. While

I came to this conclusion by the end of the hearing of the appeal, the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.

31 Moreover the expression "in accordance with the law" in section 4 of the 1997 Act comprehends also since 2 October 2000 Convention rights under the Human Rights Act 1998. Thus article 8 (right of respect for family life), article 10 (freedom of expression) and article 11 (freedom of assembly and association) all permit such derogations as are prescribed by law and are necessary in a democratic society in the interests of national security. While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society? In [\*Tinnelly & Sons Ltd v United Kingdom\*](#) (1998) 27 EHRR 249 the European Court of Human Rights had to consider public interest immunity certificates involving national security considerations issued by the Secretary of State in discrimination proceedings. The court observed, at p 290, para 77:

"the conclusive nature of the section 42 [Fair Employment (Northern Ireland) Act 1976] certificates had the effect of preventing a judicial determination on the merits of the applicants' complaints that they were victims of unlawful discrimination. The court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security considerations are present and constitute a highly material aspect of the case. The right guaranteed to an applicant under article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the ipse dixit of the executive."

It is well established in the case law that issues of national security do not fall beyond the competence of the courts: see, for example, [\*Johnston v Chief Constable of the Royal Ulster Constabulary \(Case 222/84\)\*](#) [1987] QB 129; *R v Secretary of State for the Home Department, Ex p McQuillan* [1995] 4 All ER 400; [\*R v Ministry of Defence, Ex p Smith\*](#) [1996] QB 517 and [\*Smith and Grady v United Kingdom\*](#) (1999) 29 EHRR 493; compare also the extensive review of the jurisprudence on expulsion and deportation in *van Dijk and van Hoof, Theory and Practice of the European Convention on Human Rights*, 3rd ed (1998), pp 515-521. It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security. But not all the observations in [\*Chandler v Director of Public Prosecutions\*](#) [1964] AC 763 can be regarded as authoritative in respect of the new statutory system.

99. Counsel for the Appellants also relied on [\*R v Shayler\*](#) [2003] 1 AC 247. In that case the Defendant was a former employee of the Security Service and had been charged with disclosing documents or information without lawful authority contrary to sections 1 and 4 of the Official Secrets Act 1989. In the course of a preliminary hearing, the trial judge ruled that the defence of duress or necessity of circumstances was not available to the Defendant. In considering whether the relevant sections of the Official Secrets Act 1989 were compatible with Article 10 of the European Convention on Human Rights, the House of Lords considered the effectiveness of the protection offered by judicial review in relation to a request by a member or former member of the Security Service to disclose information or documents. Lord Bingham of Cornhill said:

**32** For the appellant it was argued that judicial review offered a person in his position no effective protection, since courts were reluctant to intervene in matters concerning national security and the threshold of showing a decision to be irrational was so high as to give the applicant little chance of crossing it. Reliance was placed on *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, in each of which the European Court was critical of the effectiveness of the judicial review carried out.

**33** There are in my opinion two answers to this submission. First the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually, a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 considerations. The second answer is that in any application for judicial review alleging an alleged violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. The change was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546-548 where, after referring to the standards of review reflected in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, he said:

"26. ... There is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.

"27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

"Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Professor Paul Craig, *Administrative Law*, 4th ed (1999), pp 561-563; Professor David Feldman, 'Proportionality and the Human Rights Act 1998', essay in *The Principle of Proportionality in the Laws of Europe* edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has

struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138: 'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.' In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

"28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way."

#### 100. Lord Hope of Craighead also dealt with the intensity of review:

**61** These matters were identified in the Privy Council case of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He adopted the three stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, where he drew on jurisprudence from South Africa and Canada: see also *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547A -B , per Lord Steyn; *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] 1 AC 800, 844A -C . The first is whether the objective which is sought to be achieved—the pressing social need—is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.

#### 101. We should also note paragraph 80 in the Speech of Lord Hope where he touched on the margin of discretion to be afforded to the executive:

**80** The question is whether the scheme of the Act, safeguarded by a system of judicial review which applies the test of proportionality, falls within the wide margin of discretion which is to be accorded to the legislature in matters relating to national security especially where the Convention rights of others such as the right to life may be put in jeopardy: *Leander v Sweden* 9 EHRR 433, para 59; *Chassagnou v France* (1999) 29 EHRR 615, paras 112-113. I do not think that it can be answered without taking into account the alternatives.

102. Counsel for the Respondent relied on the case of *R on the application of Al Rawi v Secretary of State for the Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279 as illustrating the extent of the deference that the Courts ought to afford to the Secretary of State in cases where the general subject matter raised matters of assessment relating to terrorism, national security and foreign policy. In particular, he drew attention to paragraphs 131 and 132 of the Judgment of the Court of Appeal:

(v) *Material considerations: Wednesbury*

**131** In our judgment the claimants' submissions on this part of the case fall foul of two principles. First, they invite the court to enter into what in *Abbasi's* case [2003] UKHRR 76 was described as a "forbidden area", that is, the conduct of foreign relations. Secondly what is and what is not a relevant consideration for a public decision-maker to have in mind is (absent a statutory code of compulsory considerations) for the decision-maker, not the court, to decide: see *CREEDNZ v Governor General* [1981] 1 NZLR 172, 183, per Cooke J, as approved in English law in *In re Findlay* [1985] AC 318, 333-334, per Lord Scarman.

**132** It is not contended, nor could it be, that the defendants have acted in bad faith. The reality is that the claimants seek to persuade us to order the Foreign Secretary to adopt a different judgment as to the conduct of negotiations with the United States, upon a delicate policy issue, from that which, upon mature consideration, she has so far made. That offends the first principle to which we have referred. In support of this enterprise, the judicial review grounds list something like 37 factors which it is said should have been taken into account. More factors are given in the grounds of appeal. They have all been constructed by the lawyers, as if for all the world it is for the court to decide what the Foreign Secretary should and should not bear in mind in deciding what policy stance to adopt. That offends the second principle to which we have referred.

103. Counsel for the Appellants also drew our attention to the Judgment of Richards J (as he then was) in *The Queen (on the application of the Kurdistan Workers Party and Others) and Secretary of State for the Home Department* [2002] EWHC 644 (Admin). This was a challenge by, amongst others, the PMOI, to the proscription of it which was brought by way of judicial review. Richards J held that the appropriate forum for any challenge was by way of appeal to POAC against the refusal of the Secretary of State to desproscribe the organisation. In the course of his Judgment he considered the nature of POAC's function:

Appropriateness of judicial review

70. The next, and to my mind the most important, question for consideration is whether it is appropriate for the various challenges to proceed by way of judicial review. For the Secretary of State, Mr Sales submits in essence that permission should be refused because POAC can and should determine the substantive issues raised and is the appropriate forum for

that purpose. He has an alternative, fall-back position that judicial review should be allowed to proceed on individual procedural issues but not on issues that depend on an assessment of the underlying facts. Counsel for the claimants, on the other hand, submit that POAC cannot review the specific decisions under challenge, cannot consider the full grounds that the claimants wish to raise and cannot give the remedies they seek. By contrast, the Administrative Court can consider the entirety of the claims and can grant the full range of relief and is therefore the appropriate forum.

71. It is common ground that the decision is discretionary. The court's jurisdiction is not excluded by the 2000 Act, by contrast with the position under s.30 of the Anti-terrorism, Crime and Security Act 2001 where certain human rights issues in the field of immigration can be questioned in legal proceedings only before the Special Immigration Appeals Commission.

72. Mr Sales points to statements of principle to the effect that judicial review is a remedy of last resort and that judicial review will not normally be allowed where there is an alternative remedy by way of appeal (see e.g. *R v. Panel on Take-overs and Mergers, ex p. Guinness Plc* [1990] 1 QB 146 at 177E-178A and *R v. Chief Constable of Merseyside Police, ex p. Calveley* [1986] QB 424). He also relies, by way of analogy, on statements in *R v. DPP, ex p. Kebilene* [2000] 2 AC 326 and *R (Pretty) v. DPP* [2002] 1 All ER 1 to the broad effect that satellite litigation by way of judicial review is to be avoided in relation to issues arising in the context of criminal proceedings. The same principle, he submits, applies in relation to issues that have been or could be raised in proceedings before POAC.

73. The claimants' counsel, in particular Mr Rabinder Singh QC who presented the PMOI's main submissions on this part of the case, submits that the true principle is that an alternative procedure should be exhausted first if it is at least as extensive as judicial review (see generally the discussion at paras 20-018 to 20-021 of de Smith, Woolf and Jowell, "Judicial Review of Administrative Action"), that one potential exception is where the ground of challenge is based on procedural fairness (ex p. *Guinness* at 184G-185A) and that where the suggested alternative forum cannot consider the entirety of a complaint which can be raised by way of judicial review, the court should entertain a claim for judicial review (*R v. Inland Revenue Commissioners, ex p. Mead* [1993] 1 All ER 772 at 781-2).

74. All such statements of principle and illustrations of their application provide helpful guidance, but an exercise of discretion in a matter of this kind depends very much upon the particular subject-matter and context of the claim.

75. It is plain that Parliament, although not seeking to exclude the possibility of judicial review, intended POAC to be the forum of first resort for the determination of claims relating to the lawfulness of proscription under the 2000 Act. The procedure established for challenging proscription, whether by inclusion in Schedule 2 as originally enacted or by subsequent addition to the list by means of an order under s.3, is an application to the Secretary of State for removal from the list and an appeal to POAC if the application is refused, with a further avenue of appeal to the Court of Appeal on a question of law.

76. POAC is, as Mr Sales submits, a specialist tribunal with procedures designed specifically to deal with the determination of claims relating to proscription, a context heavily laden with issues of national security: cf. the observations of Lord Steyn in *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 at 888-9, para 30, in relation to the equivalent composition and procedures of the Special Immigration Appeals Commission under the Special Immigration Appeals Commission Act 1997 (though POAC and SIAC do not have an identical status). The special advocate procedure and the existence of extensive powers in relation to the reception of evidence, including otherwise non-disclosable evidence, place POAC at a clear advantage over the Administrative Court in such an area. In many respects the Administrative Court might be able to devise something equivalent: Lord Lester referred to the observation of the Strasbourg Court at paragraph 78 of the judgment in *Tinnelly & Sons Ltd. & Others v. United Kingdom* (1998) 27 EHHR 249, that "in other contexts it has been found possible to modify judicial procedures in such a way as to safeguard national security concerns about the nature and sources of intelligence information

and yet accord the individual a substantial degree of procedural justice". But it would be far less satisfactory to go down that route than to utilise the POAC procedure already carefully formulated for the purpose.

77. Moreover proceedings before POAC are expressly excluded from the prohibition on the disclosure of intercepted communications, potentially a very important area of evidence; and although it was submitted for the claimants that the same or a similar result could be achieved in the Administrative Court by a Convention-compliant construction of the Regulation of Investigatory Powers Act 2000, in particular the power under s.18(7)-(8) to order disclosure to a judge of the High Court, this is at best very uncertain and would again be a less satisfactory route than reliance on the clear and general exception under s.18(1)(f) in respect of any proceedings before POAC or any proceedings arising out of proceedings before POAC.

78. POAC has also been designated as the appropriate tribunal for the purposes of s.7 of the Human Rights Act in relation to proceedings against the Secretary of State in respect of a refusal to deproscribe.

79. All those considerations tell strongly in favour of POAC being the appropriate tribunal for consideration of issues falling within what I have previously termed category (2), namely whether proscription was necessary in a democratic society and whether it was non-discriminatory. Those are important parts of the PMOI and LeT claims. They depend heavily on a scrutiny of all the evidence, including any sensitive intelligence information, concerning the aims and activities of the organisations concerned and a comparison between them and other organisations proscribed or not proscribed. I recognise that POAC's appellate jurisdiction relates not to the original proscription but to a refusal to deproscribe, whereas by these proceedings the claimants challenge the original decision to proscribe. But in relation to these substantive issues, at least, I do not think that anything turns on that point. The issues are materially the same whether they are raised in the context of the original proscription or in the context of a refusal to deproscribe. In the case of the PMOI and the LeT, where there have been applications to deproscribe and appeals have been lodged with POAC in respect of the refusal to deproscribe, the issues are already before POAC in materially the same form as they are sought to be raised in this court, as is apparent from a comparison between the written cases in the two fora. If the claimants' arguments are well founded, they will succeed before POAC or on appeal from POAC and this will result in their deproscription. Indeed, it is asserted in the PMOI's amended claim form that "[h]ad the Secretary of State acceded to the Claimants' application ... it would have been unnecessary to bring legal proceedings of any kind" (para 90). If, therefore, the substantive issues stood alone, there would to my mind be no question but that POAC is the appropriate forum and permission to apply for judicial review should be refused.

80. The problems arise out of the fact that such issues do not stand alone. The PMOI and LeT claimants also raise issues falling within what I have previously termed category (1), i.e. a procedural challenge to the original decision to include the organisations in the draft Order and to the Order itself. Moreover the PKK claimants have not even raised issues within category (2) and have not themselves sought deproscription or appealed to POAC, but have focused their challenge, so far as the proscription of the PKK is concerned, on the broad submission that the original decision and Order are vitiated by a failure to observe the procedural guarantees required by the Convention.

81. In my view it would be possible for those procedural issues, taken by themselves, to be determined in the Administrative Court as effectively as in POAC. Moreover the natural targets of any challenge on those grounds are the original decision and Order, which lie within the jurisdiction of the Administrative Court but not of POAC. If there was a procedural defect as alleged, it occurred at that original stage and not at the stage of the subsequent refusal to deproscribe; and it would generally be considered artificial and inappropriate to challenge a subsequent decision on grounds relating to a defect in the original decision.

82. The present context strikes me, however, as exceptional. The legislative intention is in my view that challenges to an organisation's presence in the list of proscribed organisations

should be brought by way of an application for deproscription and appeal to POAC. It is possible to give effect to that legislative intention even in relation to a challenge based on procedural defects vitiating the original decision to proscribe. That is because, as Mr Sales submits, the Secretary of State can be requested to deproscribe on the basis that the original proscription was unlawful on procedural as well as substantive grounds; and if the Secretary of State refuses to deproscribe, an appeal can be brought on the basis that he has erred in law and/or acted in breach of the claimants' Convention rights in so refusing. Mr Emmerson expressed the concern that the Secretary of State might be able to avoid any appealable error by expressing no view one way or the other on the lawfulness of the original proscription. Whatever the theoretical merit of that argument, I cannot see this happening in practice, given the Secretary of State's stance that all matters are more appropriately dealt with on appeal to POAC rather than by way of judicial review. It would be extraordinary if the Secretary of State were to adopt a course that threw the claimants back onto judicial review as the only means of obtaining an effective remedy, the very thing that the Secretary of State seeks so strenuously to avoid.

83. If the various aspects of the procedural challenge to the original decision can be raised in this way before POAC on an appeal from a refusal to deproscribe, as I think they can, one comes back to whether that is the more appropriate course than to allow a direct challenge to the original decision by way of judicial review. In my judgment it is. That applies with particular force to the PMOI and LeT, since it is much better that their challenge to proscription on substantive grounds be determined by POAC and there is an obvious advantage in all issues being determined by the same tribunal (especially given the inevitable existence of a degree of overlap between what I have termed the substantive and the procedural issues). It is less obvious in the case of the PKK, where there are no proceedings before POAC and the procedural grounds advanced in relation to proscription could all be dealt with as satisfactorily by the Administrative Court. Since, however, POAC is intended to be the forum of first resort and is the appropriate forum for the PMOI and LeT claims, and since there is a heavy overlap between PKK's procedural grounds and the procedural grounds advanced by the PMOI and LeT, POAC is also in my view the appropriate forum for the PKK claim. It is better for all these matters to be determined by POAC, with an appeal if necessary to the Court of Appeal on questions of law, than to allow the claims to be spread between two jurisdictions or to allow the entirety of the claims to proceed in the Administrative Court. As already mentioned, it is still open to the PKK to go down the POAC route even though it has not yet done so.

84. In considering the appropriateness of POAC as a forum for issues relating to proscription/deproscription, I have taken into account the fact that there is no material difference between POAC and the Administrative Court in terms of the legal principles to be applied: by s.5(3) of the 2000 Act, POAC is required to allow an appeal if it considers that the decision to refuse to deproscribe was flawed "when considered in the light of the principles applicable on an application for judicial review". I see no reason why POAC should be any less able than the Administrative Court to provide effective scrutiny of the matters under challenge.

104. The starting point in the present appeal is, of course, the language of the Act itself. Under section 3(4), the Secretary of State can only exercise his power to proscribe an organisation "*if he believes that it is concerned in terrorism*". As we have set out above, in our view the Secretary of State is under an obligation to conduct periodic reviews of the organisations which have been proscribed in order to satisfy himself that the statutory requirement is still met and must direct himself to that question when that obligation is crystallised by an application for deproscription.

105. As Laws LJ set out in A a “belief” that an organisation “is concerned in terrorism” is a requirement that the relevant decision maker thinks that the organisation is as a matter of fact concerned in terrorism. It requires something more than a suspicion or fear that it *may* be concerned in terrorism.
106. It was common ground that the statutory test in section 3(4) of the Act does not require proof of facts to a standard akin to civil or criminal proceedings. The requirement is that the Secretary of State must have reasonable grounds for forming the relevant belief.
107. As Laws LJ also said in A the power of the executive to proscribe organisations and criminalise membership or support of them on grounds of no more than reasonable belief is, on its face, grossly antithetical to established constitutional rights. The policy underlying the Act is, however, readily understandable: there is an obvious and clear legislative intent to ensure that the activities of organisations which carry out, support or promote acts or threats of violence against either the UK or foreign governments and their peoples should be circumscribed.
108. In our view, it is clear that Parliament intended that, whilst recognising that the primary duty to decide on deproscription is imposed on the Secretary of State, there should be effective checks and balances built into the statutory scheme. In reaching his decision in response to an application for deproscription, the Secretary of State will inevitably have access to information, material and assessments which will not be known to the relevant applicants and which cannot be disclosed to them. Indeed, given that, as in the present appeal, an application for deproscription can be made by persons other than the organisation or members of the organisation itself, Parliament must have contemplated that the applicants in question may have very little direct knowledge of the organisation’s activities and aims.

109. Similarly, while the Secretary of State is accountable to Parliament for his acts, the reality is that it is only before this Commission that the decision-making process of the Secretary of State can be subjected to detailed scrutiny in the light of all of the relevant material.
110. Further where, as in the present appeal, the Secretary of State chooses not to engage in any consultation or fact finding exercise with the applicants before reaching the decision to refuse their application (as in our view he is entitled to do), it is only before this Commission that the applicants can adduce further evidence or material to support their contentions or to rebut the matters relied on by the Secretary of State.
111. In addition, the potential importance to individuals of an effective right of review is illustrated by section 7 of the Act. A person who is convicted of a criminal offence under the Act after a refusal by the Secretary of State to deproscribe the relevant organisation can have the conviction quashed if POAC concludes on an appeal against *that* decision that it was flawed and orders the removal of the organisation from Schedule 2. On the Respondent's case, the primary focus on a review ought to be on the material that was actually before the relevant decision maker at the time the decision was made. Any "new" evidence that, for example, comes into existence as part of the appeal process should ordinarily form part of a new application for deproscription even if the Secretary of State has chosen not to ask for further information from the applicants prior to making his decision and even though the statutory procedures specifically contemplate such evidence will inevitably come into existence after the date of the relevant decision making process.
112. Clearly if that "new" application for deproscription was successful, it would not assist any person convicted of an offence in the period between the original refusal to deproscribe and the second decision, even if the material that led to the second decision could have been before the decision maker at the time of the original decision. What this points to is that the appeal before POAC should be an effective and thorough review of all of the material then available to assess whether or not the Secretary of State's decision was flawed.

113. In the light of the authorities referred to above and the general considerations that we have outlined, we accept that POAC's function is to subject both stages of the decision making process to intense scrutiny. It is artificial to draw a distinction between the First and Second Stages. There is a single power to proscribe the organisation. It would be a strange interpretation of the Act if the criterion that Parliament has determined is so important that it must be satisfied before the Secretary of State can exercise the power to proscribe (and which has to be satisfied before the Secretary of State can refuse to deproscribe the organisation) is not to be subject to intense scrutiny by the one body that has been set up to receive and consider the material relevant to that decision, but that the discretionary factors (which, as set out below, relate to areas where we accept that any Court must afford very considerable deference to assessments made by the Secretary of State) are to be subject to that intense scrutiny.
114. Thus, in our view, both Stages of the Secretary of State's decision are subject to the requirement of an intense and detailed scrutiny by POAC of the relevant material.
115. At the First Stage, we have to determine whether there were reasonable grounds for the Secretary of State's belief that the PMOI "*is concerned in terrorism*". This is an objective judgment which, as Lord Woolf CJ observed in *M* (cited with approval in *A*) involves a value judgment as to what is properly to be considered reasonable in the circumstances of the present case. That conclusion is consistent with the Judgment of the Court of Appeal in *MB*: see, in particular, paragraphs 60 and 67 of the Judgment set out above. It is also consistent with the Determination of this Commission on the Preliminary Issues hearing in the earlier appeals. As has been set out above, in paragraph 65 of that Determination, this Commission concluded that Parliament had devised a detailed procedure (including the creation of this Commission) which provides for the Appellants' case for deproscription to be rigorously scrutinised initially by the Secretary of State, and then by this Commission.

There is nothing in the submissions advanced before us that leads us to a different conclusion in this appeal.

116. It is not our function to substitute our view for the decision of the Secretary of State. Ultimately at the First Stage the question remains whether a reasonable decision maker could have believed that the PMOI “*is concerned in terrorism*” on the basis of all of the evidence that is now before us. It is our function, however, to scrutinise all of the material before us carefully and to examine its strengths and weaknesses to see if it provides reasonable grounds for the Secretary of State’s belief. At the Second Stage, we must scrutinise all the material to see if it provides a reasonable basis for the exercise of his discretion.
117. This will involve looking at the material as a whole, and looking for the picture or patterns that emerge. As Lord Steyn stated in his speech in *Daly* (cited with approval by Lord Bingham in *Shayler* in the passages set out above) the scrutiny may require us to assess the balance that the Secretary of State has struck and to consider the relative weight accorded to the material.
118. Indeed, Counsel for the Respondent properly accepted that, subject to his contention that considerable deference ought to be given to the views and assessments of the Secretary of State, as part of its consideration of whether there are reasonable grounds for the Secretary of State’s belief, it is for POAC to assess the weight to be attached to parts of the evidence when viewed in the light of the evidence as a whole.
119. We accept that appropriate deference has to be given to the Secretary of State in, for example, assessments of national security or on foreign policy issues. We also accept that we must be careful to recognise where the Secretary of State has the benefit of particular expertise, for example in relation to assessments made by the intelligence services. We do not accept, however, that we can or should simply defer to the Secretary of State (or indeed the views of the intelligence services or his advisers) on all matters. It depends on the nature of the evidence or material being considered. Much of the material

before this Commission relevant to the First Stage of the decision-making process is essentially factual and is of a type that Courts are familiar with assessing in ordinary litigation.

120. This is not least because the question being addressed at the First Stage is concerned with establishing a belief as to the current activities of the organisation. There are no policy issues being addressed at the First Stage although we entirely accept that part of the material to be considered involves evaluation and assessments made by appropriate officials and agencies.
121. In contrast, much of the material relevant to the Second Stage is concerned with policy issues and, more particularly, assessments of foreign policy and national security. Clearly in those areas, even under the heightened scrutiny test, a greater deference must be accorded to the judgment and assessments of the Secretary of State made on the basis of specific advice and assessments by those particularly qualified to give such advice and to make such assessments.

**(v) “Concerned in Terrorism” (Issue 2)**

122. At the First Stage, the question is what is meant by the definition of “is concerned in terrorism” in section 3(4) to (5C) of the Act (as amended).
123. This was, again, the subject of considerable debate before us.
124. In our view the criteria set out in sub-sections 3(5)(a) to (c) are focussed on current, active steps being taken by the organisation. There could be reasonable grounds for a belief that the organisation is concerned in terrorism based on the organisation’s past activities, but that material would have to be such that it gave reasonable grounds for believing that the organisation was currently engaged in any activities specified in those three subsections. If the acts relied on occurred shortly before the decision being made by the Secretary of State they would be likely to provide powerful evidence to justify his belief, even in the absence of specific material that the organisation was at the time of the decision actively involved in, for example, planning a particular

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

125. Section 3(5)(d) of the Act is, however, rather different. It is clearly intended to be a general provision which sweeps up organisations who are “*concerned in terrorism*” that are not caught by the earlier subsections. We should note that defining a statutory test of “*is concerned in terrorism*” in terms that “*an organisation is concerned in terrorism...if it is otherwise concerned in terrorism*” is not, at first sight, particularly helpful or illuminating.
126. For present purposes, taking account of the definition of terrorism in section 1 of the Act, the full meaning of the subsection is “*is otherwise concerned in the use or threat of action (as defined in section 1(2) of the Act) inside or outside the UK where the use or threat is designed to influence the government or to intimidate the public or section of the public (including a government and/or the public of a country other than the UK) and is made for the purpose of advancing a political, religious or ideological cause*”. “Concerned” in subsection 3 (5) (d) must be activity (“action”) of a similar character to that set out in the subsections 3 (5) (a) to (c).
127. In our view, this could include an organisation which has retained a military capability and network which is currently inactive (i.e. not currently committing, participating in or preparing for terrorism) for pragmatic or tactical reasons, coupled with the intent of the organisation or members of it to reactivate that military wing (i.e. to commit, participate in or prepare for terrorism) in the future if it is perceived to be in the organisation’s interests so to do. It would not, however, include an organisation that simply retained a

body of supporters, without any military capability or any evidence of, for example, attempts to acquire weapons or to train members in terrorist activity, even if the organisation's leaders asserted that it might, at some unspecified time in the future, seek to recommence a campaign of violence. It cannot be said of an organisation in the latter category that a reasonable person could believe that it "*is otherwise concerned in terrorism*" - i.e. that it is currently concerned in terrorism - merely because it *might* become involved in terrorist activity at some future date.

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

**(vi) Advisers' Knowledge**

129. It has become necessary for us to consider the extent to which the Secretary of State can rely on material that is known to his officials but which was not positively before him at the time the decision was made.
130. Once again, the starting point is the language of the Act. It is clear that the relevant decision maker is the Secretary of State. It is the Secretary of State who must have reasonable grounds for and hold the belief in question and who must decide to exercise the discretion to continue proscription if he does have such a belief. That cannot be delegated to officials. As such, the

Secretary of State must ensure that he has before him and considers the relevant factual material, any relevant assessments and advice from officials and government agencies and that he properly directs himself as to the legal test to be applied. In this context, it is helpful to set out some paragraphs from the judgment of Sedley LJ (with whom the other members of the Court agreed, albeit adding some further reasons of their own) in *The Queen on the application of National Association of Health Stores & Another v Department of Health* [2005] EWCA 154:

What knowledge does the law impute to Ministers?

23. The next question is altogether more profound. It is not answered, only broached, by the historic decision of this court in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. There the court was presented with an attempt to transpose a familiar doctrine of the law of agency – the rule that one who is delegated cannot himself delegate – into the field of public administration, treating the minister as the Crown’s delegate. Lord Greene MR, with his compendious knowledge of public administration, recognised the inappropriateness of the argument and answered it by holding that in law – as the Northcote-Trevelyan reforms had by then firmly established in practice – civil servants acted not on behalf of but in the name of their ministers.

24. *Carltona*, however, establishes only that the act of a duly authorised civil servant is in law the act of his or her minister. It does not decide or even suggest that what the civil servant knows is in law the minister’s knowledge, regardless of whether the latter actually knows it. For the novel proposition that it is, Mr Cavanagh founds upon one sentence in Lord Diplock’s speech in *Bushell v Secretary of State for the Environment* [1981] AC 75:

“The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister’s own knowledge, his own expertise.”

25. It is Mr Cavanagh’s submission that this affords a complete answer, without resort to evidence, to the accusation that Lord Hunt was inadequately informed about Professor Ernst’s views when he signed the Order. The departmental knowledge, which included everything that was material about Professor Ernst and his report, was the minister’s, even if the minister did not in fact know it. This argument, advanced below by Mr Philip Sales, was accepted by Crane J. He held:

72. It follows that information available to officials involved in advising a minister is information that can properly be said to be information taken into account by the minister. It was submitted by Mr. Thompson QC that this would mean that information known to any official in the department can be said to be known to the minister taking a decision. I do not think that follows. If on a challenge to a decision, it were to be asserted that the Secretary of State took into account such information, when in fact no official involved in the matter knew of it, that would in my judgment be an inaccurate assertion. Nor, for example, would it be an accurate assertion if the relevant information was buried in a file but not in fact considered by any official in the matter. However, it does not follow that the court will in the ordinary way investigate whether such an assertion is accurate.

26. In my judgment, and with great respect to Crane J, this part of his decision is unfounded in authority and unsound in law. It is also, in my respectful view, antithetical to

good government. It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified, as Crane J qualified it and as Mr Cavanagh now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decision-making authority (to adopt the lexicon used by Lord Griffiths in *Oladehinde* [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.

27. In contrast to *Carltona*, where this court gave legal authority to the practical reality of modern government in relation to the devolution of departmental functions, the doctrine for which Mr Cavanagh contends does not, certainly to my knowledge, reflect the reality of modern departmental government. The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice. I will come later in this judgment to the critical question of how much of the evidence the minister needs to know; but I cannot believe that anybody, either in government or among the electorate, would thank this court for deciding that it was unnecessary for a decision-maker to know anything material before reaching a decision.

28. Four years after *Bushell* was decided, the High Court of Australia had before it an issue akin to the issue before us. A minister had made an order affecting land rights in ignorance of a potentially crucial fact. The fact was known, however, within his department. It is of interest that the minister's counsel, David Bennett QC (now S-G), one of Australia's leading constitutional lawyers, did not attempt to advance the argument which has been advanced by Mr Cavanagh. He contended only that the minister could lawfully delegate fact-finding to officials, and that there was no evidence that the material fact had been overlooked at official level: in other words, he sought to refine *Carltona* into a doctrine of split or partial delegation.

29. The High Court rejected this endeavour. Gibbs CJ said:

“Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law”

30. Mason J (as he then was) pointed out that what was being proposed was that “the minister had power to delegate part of his decision-making function ... to his department, and that he exercised this power by splitting the function, leaving his staff to decide what facts or matters would be taken into account.” Any delegation, he went on to point out, must first be lawful and secondly be shown to have been made. He made it clear that in that case (as in this) the issue was whether the decision-maker had omitted a consideration which was in the obligatory class of relevance.

31. The High Court was unanimous in rejecting the argument, both on principle and from convenience, that the minister could decide without actually knowing something which bore the requisite degree of relevance to his decision. I will come below to the valuable remarks of Brennan J on the content of the ministerial obligation.

32. In the light of this significant Australian decision one comes back to what Lord Diplock said in *Bushell*. The full passage reads:

“What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the minister and the other servants of the Crown who serve in the government department of which he is the head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament’s intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister’s own knowledge, his own expertise.”

33. In my judgment *Bushell* is not authority for what Mr Cavanagh seeks to derive from it. It is a decision about due process – specifically, about what fairness requires where new material which emerges between the report to the minister and his decision is digested departmentally. Lord Diplock’s point is that the departmental advice is part of the ministerial decision, not of the inspector’s report. It is an element in the minister’s thinking. It was not argued before the House, and their Lordships were not invited to decide, that the minister could reach his decision in ignorance of a relevant factor so long as it was known within his department. The question was whether what was known to the department ought to have been made available to the objectors. This is why in *Peko-Wallsend* Brennan J was able to cite the material passage from *Bushell* in support of his proposition (at 66) that “if ... the validity of the minister’s decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision”.

34. I do not understand the decision of this court in *R v Secretary of State for Education, ex parte S* [1995] ELR 71 to have done more than apply *Bushell* in the sense I have ascribed to it. Russell LJ at 78 accepted the submission that, provided the issue is not a new one, ministers are entitled to consider in-house advice on it without first disclosing the advice for comment. Peter Gibson LJ, whose knowledge of this field is very great, described (at 85) “the practical reality... that the Secretary of State would call on the considerable expertise within his department to assist him in making up his mind”. The words I have italicised help Mr Cavanagh not at all.

35. The courts have had from time to time to question the apparent breadth of Lord Diplock’s dictum. In *Best v Secretary of State for the Environment* [1997] EWHC Admin 226 counsel for an objector in a planning case based upon it a submission that the contents of an incoming letter lying in the Department’s postroom were imputedly known to the Secretary of State. The deputy High Court judge, Mr. Lockhart-Mummery QC, generously described the submission as having an air of unreality. Mr Cavanagh, recognising this, falls back upon a limitation of material knowledge to that possessed by “civil servants who have responsibility for receiving the information, considering it and advising the minister thereon”. This was how it was argued for the minister and accepted by the deputy judge in *Best*, so that at least the contents of the postroom were exempted from the departmental fund of knowledge; but for reasons I have given in paragraph 26 above it makes the respondent’s position more, not less, problematical.

36. Implicitly acknowledging this, Mr Cavanagh submitted that the *Bushell* doctrine involves neither actual nor even imputed knowledge on the minister’s part. In a sense which he was content to call metaphysical, the knowledge of responsible civil servants was the knowledge of the minister because the department was a single entity. The nearest Mr

Cavanagh was able to come to citing binding authority for this view was Lord Hoffmann's remark, explaining the Bushell dictum, in *R (Alconbury Ltd) v Secretary of State for the Environment* [2003] 2 AC 295, §127, that "the process of consultation within the department is simply the Secretary of State advising himself". But this, it is to be noted, followed a passage (§126) in which Lord Hoffmann described the departmental decision-making processes in this way:

"These contain, on the one hand, elaborate precautions to ensure that the decision-maker does not take into account any factual matters which have not been found by the inspector at the inquiry or put to the parties and, on the other hand, free communication within the department on questions of law and policy, with a view to preparing a recommendation for submission to the Secretary of State or one of the junior ministers to whom he has delegated the decision."

None of this is grist to Mr Cavanagh's mill.

37. The serious practical implication of the argument is that, contrary to what he decided English cases take for granted, ministers need know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision-maker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake.

38. The only authority Mr Cavanagh was able to produce which appeared to chime with his argument was a decision of Lord Clyde, sitting in the Outer House of the Court of Session, in *Air 2000 v Secretary of State for Transport (No 2)* [1990] SLT 335. Advice from the Civil Aviation Authority which by statute the Secretary of State was required to consider had been seen not by him but by an interdepartmental working party which advised him. Lord Clyde cited *Carltona* for the uncontroversial proposition that "what is done by his responsible official is done by [the minister]". However, while rejecting as "too extreme" a submission that the mere physical delivery of the advice to the department was sufficient, Lord Clyde accepted that "if it is given to an official who has responsibility for the matter in question, that should suffice". If by this Lord Clyde meant that such receipt would amount in law to consideration by the Secretary of State, I would respectfully disagree. For the reasons I have given, it would be incumbent on such an official to ensure that either the advice or a suitable précis of it was included in the submission to the minister whose decision it was to be.

131. We are bound by the decision in *National Association of Health Stores*. We would, however, have reached the same decision in the absence of authority. As we have set out below, this Commission directed the Secretary of State to disclose the officials' written submission to him and supporting documents so that it could satisfy itself that the material available to it enabled it properly to determine the appeal as required by Rule 4(3) of 2007 Rules. This was because we were not satisfied that we had before us the complete picture of the basis for the decision of the Secretary of State from the witness and documentary evidence that had been served by the Respondent. That is not a criticism of the witnesses, merely a reflection of the, perhaps, unusual circumstances of this case.

132. The relevant witness (Mr. Fender) is an official in the Foreign & Commonwealth Office and he was not directly responsible for advising the Secretary of State. The official responsible for giving such advice was in the Home Department, although Mr Fender contributed to the advice that was sent to the Secretary of State. As set out above and in detail below the Secretary of State had before him only a limited number of documents, namely the Submission, the Application for deproscription, a draft letter refusing the application for deproscription, and a closed report from JTAC.
133. As the *National Association of Health Stores* case makes clear, if this Commission concluded that the documents prepared by the officials failed to bring to the Secretary of State's attention material considerations which he was bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence must be that the decision is flawed irrespective of whether or not officials within any of the relevant departments had knowledge of the considerations in question. The same is true, in our judgment, if, on a fair reading of the documents put before the Secretary of State, this Commission was satisfied that the advice from officials had not adequately set out matters or considerations which might affect the assessment of the Secretary of State in discharging his duty to determine whether he believed on reasonable grounds that the PMOI was concerned in terrorism at the date of his decision.

## **E. THE MATERIAL**

### **(i) Introduction**

134. The Commission was supplied with a very considerable quantity of material and submissions by the parties. The open material alone (comprising the evidence served and relied on by the Appellants and the Secretary of State, together with "exculpatory material" which was disclosed by the Secretary of State as being documentary material which potentially undermined his case and/or advanced the Appellants' case) runs to some 15 volumes.

135. Before considering the material and, regardless of the outcome of the present appeal, we should say that the PMOI and its supporters have, on many occasions, not helped themselves in achieving their objective of deproscription.
136. It is clear that the PMOI regard anyone who appears to take a different view of events to themselves as either disseminating misinformation from the Iranian authorities or acting pursuant to secret understandings or agreements with the Iranian authorities. Moreover, the PMOI does not regard its historic military activities as being terrorist actions with the result that, although there are repeated statements by senior figures in the PMOI leadership that they renounce “terrorism”, that does not include attacks by the PMOI against Iranian interests precisely because the PMOI does not accept that such attacks were or are “terrorist” acts. Many public statements contain “spin”, which justifies any decision-maker in being cautious in the assessment of those statements and the weight to be attached to material emanating from the PMOI which is not corroborated by other sources. Moreover, some of the evidence filed before this Commission is contradictory and, to put it neutrally, potentially misleading.
137. Furthermore, both the Secretary of State and POAC were provided by the Appellants with a considerable number of documents which did not appear to us to be relevant to the real issues on this appeal. We were also provided with a number of legal opinions from a wide range of PMOI supporters. Although these gave us some interesting reading they did not assist us in the determination of the issues which we had to consider on this appeal.
138. Having said that, we have concluded that, as one would perhaps expect in relation to an organisation that for many years maintained a heavily armed force in a country bordering Iran, the Iranian authorities (and its supporters) have also been active in disseminating information designed to undermine the PMOI. This equally has to be treated with caution in any objective review of the material. Whether it is correct to describe it as a “massive misinformation campaign conducted by the Iranian regime” as asserted by the Appellants is

much more doubtful, but it is certainly our view that both the Secretary of State and this Commission have to analyse information that may have come from, or been influenced by the Iranian authorities, with considerable care in order to assess its likely reliability and the weight to be attached to it.

139. While we have no doubt that the Appellants and the PMOI may not agree with some of our comments about their conduct, the point of making them is to underline the fact that the making of assessments by the Secretary of State with the help of his advisers in such circumstances is inevitably difficult.

**(ii) The Documents before the Secretary of State on the 1<sup>st</sup> September 2006**

**(a) The Submission**

140. In order to have all the material available to it so that it could properly determine this appeal the Commission directed the Secretary of State that, in addition to a JTAC report produced for the purposes of the application for deproscription in August 2006, the Secretary of State should disclose any other documents produced for and given to the Secretary of State for the purposes of the application and serve a witness statement explaining the process.
141. In consequence the Secretary of State served the Witness Statement of a Senior Civil Servant in the Home Office, Catherine Byrne, on the 25<sup>th</sup> July 2007 [1/Tb D2/81]. She was at the relevant time a deputy director of the Office for Security and Counter Terrorism in the Home Office and one of the responsibilities of her team was to prepare advice for Home Office ministers concerning proscription. Her team was responsible for the submission in relation to this application for deproscription.
142. Her Witness Statement sets out the chronology relating to the application following its delivery to the Home office on the 23<sup>rd</sup> June 2006:

- 142.1. On the 13<sup>th</sup> July 2006 unnamed representatives of the Home Office (“HO”), JTAC and the Foreign & Commonwealth Office (“FCO”) met. The meeting was not minuted. Mr Fender was not present at this meeting. The purpose of the meeting was for the HO officials, who were dealing with the application, to obtain information relevant to the application. No doubt at this meeting and during other contact the representative of the FCO provided its view of the information available to both the HO and JTAC representatives.
- 142.2. A further un-minuted meeting took place on the 1<sup>st</sup> August 2006 at which Mr Fender was present. At these two meetings, particular issues raised by the application were discussed and information was provided by FCO officials to HO officials.
- 142.3. There was contact between HO officials and their FCO counterparts during July and August 2006. FCO officials provided information about the PMOI both generally and in response to specific questions asked by the HO.
- 142.4. After these two meetings, a draft letter was produced “in response” to the Application, based on the information provided as described above. This letter was circulated with the HO and FCO for comment, revised and re-circulated on a number of occasions in August 2006.
- 142.5. A draft submission was also circulated in August 2006 between the HO and FCO.
- 142.6. JTAC was asked to draft an assessment on the PMOI that could accompany the submission. At Paragraph 14 [9] of his Amended Second Witness Statement [6/4] Mr Fender said this:

*“When handling the Appellants application for deproscription in 2006, Home Office officials were in close contact with FCO officials and were aware of the view of FCO officials that there would be foreign policy benefits to keeping the PMOI proscribed if it met the statutory*

*test. Tony McNulty was also provided with a report from the Joint Terrorism Analysis Centre dated 1 August 2006. This makes reference to possible adverse foreign policy consequences were the PMOI to be deproscribed. ...”*

142.7. The JTAC report was finalised on the 10<sup>th</sup> August 2006.

142.8. On the 22<sup>nd</sup> August 2006 a final meeting was held to discuss the revised draft decision letter and a draft submission to the Secretary of State and Ministers. Mr Fender was present at this meeting.

142.9. Ms Byrne states that the HO submission **[1/D2/84-88]** annexing:

142.9.1. the draft decision letter **[1/D2/89-101]**

142.9.2. the JTAC report

142.9.3. the Application **[1/B1/1-29]** together with “a document in support of the application and various annexes covering publications etc” (for the whole application and annexures see **[2/1-31]**)

was provided to the Secretary of State on the 25<sup>th</sup> August 2006.

142.10. It would appear that the Bindmans letter of the 31<sup>st</sup> August 2006 **[1/B2/30-38]** together with its attachments of a copy of Iran Liberation of the 3<sup>rd</sup> July 2006 and a transcript of the Prime Minister’s speech to the Los Angeles World Affairs Council in August 2006 could not have been provided to the Secretary of State on the 25<sup>th</sup> August 2006 and did not form any part of the decision making process.

142.11. The Secretary of State agreed with the HO recommendation contained in the submission and the Decision Letter (in the same terms as the draft) was sent out on the 1<sup>st</sup> September 2006 **[1/B3/39]**.

143. The three documents provided by the HO team to the Secretary of State (that is the Submission, the draft Decision Letter and the JTAC Report) have to be read together in order to determine what material, information and advice formed the basis of his decision.
144. It is important to observe that these documents (and in particular the document which should have given advice to the Secretary of State, that is the Submission itself) did not set out in terms the statutory framework and the specific questions or tests that had to be considered and decided by the Secretary of State on this application for deproscription.
145. Furthermore, the Amended Second Witness Statement of Mr Fender at Paragraph 14 suggests that the JTAC Report was referred to and was relied upon only in relation to the exercise of discretion at the Second Stage of the decision making process, that is only if the PMOI met the statutory test at the First Stage. No direction was sought by the Respondent or made by the Commission for further evidence to be given by the Respondent in support of the reasons for his decision.
146. The JTAC Report was only referred to and produced by Mr Fender in his Amended Second Witness Statement, on the face of the Witness Statement, to meet allegations made by Lord Archer of Sandwell relating to the role of foreign policy considerations in the decision. On the face of this evidence the JTAC Report was not relied upon by the Secretary of State as a Security assessment of the PMOI for the purposes of deciding whether the first stage of the statutory test (that is whether he believed that the PMOI is “concerned in terrorism”) was met.
147. The Submission signed by a Home Office official (who was not called to give evidence) and dated the 25<sup>th</sup> August 2006 [1/D2/84—88] relied upon the JTAC Report as follows:

“Consideration. You need to decide whether, taking into account all the evidence, the PMOI should remain a proscribed organisation .... In addition to considering the application and the

proposed response you will therefore also wish to consider the JTAC assessment on the PMOI that is attached to Annex C.”

“Our Advice .... There does not appear to be any documentary confirmation of the formal decision to renounce violence referred to in June 2001 (or the subsequent decisions later in 2001 and in 2003). JTAC are also unaware of this assertion.”

148. In relation to Paragraphs 18 and 19 of the Submission, that is the Applicants’ supplementary argument relating to the five criteria relevant to the exercise of discretion, and the question of proportionality under ECHR, no reference is made in the Submission to the terms of the JTAC assessment.
149. Clearly no express reference to the JTAC report or the Submission is made (or should have been made) in the draft Decision Letter **[1/D2/89-101]**. The draft Decision Letter records the following:
  - 149.1. Paragraph 5 ... I have also paid careful attention to all other relevant information available to me from my department and other government departments. As you will realise, this includes information that, by reason of the need to protect national security, is not in the public domain.
  - 149.2. Paragraph 8 ... I have paid careful attention to the need to consider the reliability of all the information before me ...
  - 149.3. Paragraph 9 ... a clear, voluntary, renunciation [of] terrorism, together with a voluntary abandonment of its arms by its members. Neither the account of events in the document in support of the application nor the information otherwise available to me indicates that this has happened.
  - 149.4. Paragraph 11 ... I am not otherwise aware of any such new policy on the part of PMOI/MeK
  - 149.5. Paragraph 13 ...your application provides no evidence in support of the contention that any such statement or definitive statement [of renunciation] has been made, there is no such information available to me ...

149.6. Paragraph 22 ... there has been neither a properly published renunciation of the organisation's use of terrorism nor voluntary disarmament of by its members.

149.7. Paragraph 23 ... "PMOI's military activities" within Iran were "organised by the organisation's internal branch there" ... and subsequently "was definitively dissolved". No evidence in support of these assertions is provided in the annexes to the application and I have no evidence from other sources to support these assertions. .... Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future.

(b) No evidence of formal renunciation of violence

150. The Secretary of State's decision in relation to this question was based on the specific reference to the effect that the Home Office and JTAC were not aware of "any documentary confirmation of the formal decision to renounce violence referred to in June 2001 (or the subsequent decisions later in 2001 and in 2003)" in the "advice" and analysis of the HO (with input from the FCO) as to the Background, Consideration and Key Points in the Application, the Advice set out at Paragraphs 11 to 18 of the Submission Documents, and whatever information or analysis can properly be derived from a reading of the terms of the draft Decision Letter insofar as it adds anything to the other two documents.

151. In this respect Paragraph 12 of the draft Decision Letter refers to the signed statement of Mr Mohadessin dated the 20<sup>th</sup> February 2002 and states that its language is clearly inconsistent with the suggestion that with effect from June 2001 the PMOI/MeK had formally abandoned its commitment to the use of terrorist methods. This specific reference in the draft Decision Letter adds to what was said on this point in Paragraph 14 of the Submission. Interestingly, the signed statement of Mr Mohadessin of the 20<sup>th</sup> February 2002 is not

included in the documents disclosed by the Secretary of State on this appeal (and indeed was not included in any of the bundles produced by all parties before this Commission).

152. The Mohadessin Statement of the 20<sup>th</sup> February 2002 (which was served in relation to judicial review proceedings in the High Court) was included in the PMOI's First Appeal and Second Application for deproscription (see **[5/B1/2]** and **[5/7/45]**). In Paragraph 35 of Mr Fender's First Witness Statement **[3A/2/7]** he records that it stated that "*the PMOI has a military wing and a social network in Iran and representative offices throughout the world. It is not the only member of the NCRI which resorts to armed resistance, although it is the largest member of the coalition to have a practical military presence inside Iran*". In his Witness Statement Mr Fender goes on to rely on a further Mohadessin witness statement dated the 21<sup>st</sup> August 2002 and a Witness Statement from Mr Abedini (which we have considered in detail below). The absence of direct reference to either of these documents in the documents before the Secretary of State in September 2006 suggests that further analysis of these statements has probably taken place for the purposes of this appeal. Certainly Counsel for the Secretary of State referred specifically to the August 2002 statement and the Abedini Statement at paragraph 58(ii)(1) of his Open Skeleton Argument **[1/A5/169]**.

(c) Military Preparedness

153. Despite the terms of the witness statements served by the PMOI in the 2001 and 2003 applications set out below, the material on this issue was:

153.1. The proscription in February 2001 was made on the basis that "*the MeK undertakes cross border attacks into Iran, including terrorist attacks.*"**[5/2/14]**.

153.2. The FCO had made an assessment in about March 2001 **[3A/5//87]** that:

*“the scale and mode of MKO operations suggest that its claim to have a military command inside Iran is probably untrue, but it must have well-equipped and well-managed cells in larger cities to support operatives who infiltrate from Iraq to carry out attacks, and to spread MKO literature, recruit sympathisers and gather information on regime activities (Katzman).”*

153.3. In a report dated the 2<sup>nd</sup> August 2005, FCO Research Analysts stated that *“the MeK ... is unlikely to carry out terrorist actions [in Iran]”* [3/67].

(d) Evidence of Attacks

154. In relation to the implied assertion that there might be albeit inconclusive evidence of PMOI attacks between 2001 and 2006, other than the May 2002 incident there is no open material relied upon by the Secretary of State which supports this implied assertion.

155. We address this issue further below.

(e) The Decision Documents

156. We set out below our determinations in relation to these documents and the decision reached by the Secretary of State on the basis of the information and advice contained in them. However, it is worth recording at this stage, that what the documents read together and as a whole do not do is:

156.1. Set out the relevant legislative framework and the precise questions that the Secretary of State had to consider and decide. In particular no attempt was made to set out the definition of terrorism (Section 1), the test of belief that the organisation is concerned in terrorism as defined (Section 3 (4)) and the definition of “concerned in terrorism” (Section 3(5) of the Terrorism Act 2005;

156.2. identify what factual material or information was or might be relevant to each of the specific questions the Secretary of State was required to consider under the Terrorism Act;

156.3. clearly identify that the approach to be taken by the Secretary of State to the First Stage (consideration of the statutory test) and Second Stage (the exercise of discretion) involved different considerations;

**(iii) The Material before POAC**

157. In order to assess the material we have, for convenience, broken it down chronologically, indicating the submissions made by the parties where appropriate. We emphasise, however, that we are and were conscious of the need for us to look at the evidence as a whole before reaching any determinations on it. What is clear from our review of the material is that there are two key periods namely the autumn of 2001 and the period around the invasion of Iraq in 2003 by the Coalition Forces.

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

September 2006 – has, of course, been the subject of very intense debate before us.

**(iv) The PMOI's actions up to and including 2001**

159. The Respondent relied on the scale and extent of the activities of the PMOI up to 2001 as supporting the submission that he was entitled to be cautious in any assessment as to whether or not the organisation had truly either embarked on a journey from terrorist organisation to a purely democratic political force or, indeed, reached the final destination on that journey, renouncing any form of activity against the Iranian state that would fall within the definition of terrorism in the Act.
160. The Appellants accepted that the PMOI had established and maintained the heavily armed NLA inside Iraq, although it was their case that, since 1988, the NLA had not conducted any offensive incursions into Iranian territory. The Appellants and the PMOI maintained that the NLA had never been assimilated into the Iraqi armed forces and had been maintained for the purposes of self-defence (i.e. against offensive attacks by the Iranian military or by agents of the Iranian authorities operating inside Iraq) even after the decision which they alleged was taken in June 2001 to cease all military operations against Iran. We will return to this when we discuss the aftermath of the invasion of Iraq by Coalition Forces in 2003. The Appellants accepted that the PMOI had undertaken military operations inside Iran prior to 2001. They were insistent, however, that these had been against what they regarded as legitimate targets, namely property belonging to Iranian state entities together with politicians, military personnel and other Iranian state officials. Counsel for the Appellants went to considerable lengths to suggest, however, that reports that the PMOI had attacked diplomats, Western interests or civilians (whether deliberately or as what is often inelegantly termed “collateral damage”) were positively untrue.
161. As he accepted in argument, the reason why Counsel for the Appellants pursued those submissions was because attacks on internationally protected

persons or civilians would unhesitatingly be characterised as terrorist acts, whereas he submitted that the acts against state property or officials *might arguably* not have been regarded as “terrorism” prior to the enactment of the definition of terrorism in the Act. The argument that such acts were not terrorist acts at the time they were carried out was not, however, developed before us. His main submissions were that (a) any decision maker in 2006 should not have viewed the alleged actions of the PMOI through the prism of a definition of terrorism in the Act which was, according to him, “*striking...in its breadth*” but which was not in force at the time the acts were carried out, (b) a careful analysis of the facts showed that the PMOI only targeted state property and state officials which is relevant to the assessment of the nature of the organisation and in understanding how it was, on the Appellants’ case, able to bring an end to those military-style activities, and (c) more generally that although some of the historic action of the PMOI fell within the definition of terrorism in the Act, once those activities can be seen to have ceased, the Secretary of State can allow a period of time to satisfy himself that the organisation is no longer concerned in terrorism, but the longer there is an absence of violence, the less weight those historic activities can sustain a belief that the organisation is still concerned in terrorism.

162. On behalf of the Respondent, Mr. Fender dealt with the historic activities of the PMOI in paragraphs 23 to 31 of his 1<sup>st</sup> Witness Statement. As Mr. Fender made clear in paragraph 26, the central conclusion of the Secretary of State was that there could be no doubt that the organisation did carry out many attacks over an extended period of time and that the examples given by him “*demonstrate their range and severity*”.
163. Counsel for the Appellants took issue with each of the descriptions of the attacks set out relied on by Mr. Fender. He pointed out that each of the incidents had been the subject to a line by line rebuttal in either the evidence submitted by the PMOI in the First Appeal or in evidence filed by the Appellants in support of the present appeal. This was because it appeared that Mr. Fender had effectively taken his summary of alleged terrorist acts directly from the summary set out a document entitled ‘A history of the PMOI’

that had been produced by the Middle East & North Africa Research Analysts Group of the Foreign & Commonwealth Office in March 2001 [3A/5/84]. Our attention was drawn to the fact that each of the matters raised in that document had been addressed by the PMOI in the First Appeal. We were invited to conclude that none of the attacks had taken place or, at the very least, none of the alleged attacks on diplomats, civilians or Western Interests had taken place.

164. We have carefully reviewed the material to which Counsel for the Appellants has drawn our attention. We have reached the clear conclusion that the Secretary of State had reasonable grounds for believing that the PMOI was responsible for the attacks listed and, more importantly, to conclude that the PMOI had carried out many attacks over an extended period of time and that the examples set out in Mr. Fender's witness statement demonstrated the range and severity of the terrorist activities in which the PMOI had historically been involved.
165. We will not deal with all of the matters listed by Mr. Fender; a few examples will suffice.
166. At paragraph 29 of his 1<sup>st</sup> Witness Statement, Mr. Fender referred to a bomb attack at a Tehran Islamic Revolutionary Court/Public Prosecutor's office in which a security guard and a technician were killed and many others were reported to be injured. The attack took place on 2 June 1998. This was supported by newspaper reports from western news agencies and a telegram dated 3 June 1998 from the British Embassy in Tehran that included confirmation that at least two people had been "martyred" (i.e. killed) with injuries to two other people according to some reports and many others according to others (up to 40 according to the AFP as recorded in the telegram from the British Embassy), and identified the building attacked as the "Islamic revolutionary court in Tehran". It was also supported by a telegram from the British Embassy in Tehran dated 8 June 1998 [3A/5/228] in which it was reported:

2. Over the weekend more details have been reported of the bomb attacks...The figure of five killed now seems to be double counting, and apart from the bomber and one security guard the only fatality confirmed has been Wilhelm Aten, an Armenian technician carrying out repair work in the Court building. There appear to have been two other attacks, one on the IRGC HQ, and one on a plant run by the Defence Industries Organisation. There are few details about the latter two, but according to Kayhan newspaper they were incendiary attacks.

3. Speaking at Aten's funeral at the Armenian Church in north Tehran [an Iranian official] ascribed responsibility for the bombing to the MKO. The MKO's responsibility has been confirmed by [another Iranian Official]. The First Deputy Intelligence Minister, Hojjatoleslam Pourmohammadi, told Jomhuriye Islami that the intelligence and security agencies were investigating the other attacks and the results would be announced shortly.

...

COMMENT

7. The regime have now decided to credit the MKO with the attacks. Tehran Times has claimed that the could have been carried out with Taliban assistance, but most eyes will be on MKO bases in Iraq. There have been no further attacks...The targets so far have been directly associated with the security forces.

**167. Mr. Fender's statement was also supported by information from the PMOI itself. On the day of the attack, the PMOI issued a statement [3A/5/234]:**

Horrendous Explosion at Tehran Public Prosecutor's Office.

According to the report received from the MKO Command Centre inside the country today, around 1400 hrs. Tehran time, the Public Prosecutor's Office in Tehran, located in the centre of the city, was blown up in an horrendous explosion organised by the MKO military units. The building was destroyed, and tens of torturers and interrogators were killed and wounded.

**168. To similar effect was a further statement from the PMOI issued on 4 June 1998, two days after the attack [3A/5/230] albeit it disputed the reports of the death of the Armenian technician whose funeral was reported by the British Embassy:**

The MKO disclose the lies and the false propaganda of the Regime of the Mullahs, concerning the death of an Armenian citizen at the Islamic Revolution's Public Prosecutor's Office. All those who died or were wounded, are the torturers and interrogators, and there is not one single ordinary citizen amongst them.

Following the several contradictory reports of the last few days, the Regime of the Mullahs claimed that in the course of the MKO's operations last Tuesday, one Armenian Iranian was killed at the Islamic Revolution's Public Prosecutor's Office. This is total nonsense. All those who died or were injured in the course of the MKO's attack on the Tehran Public Prosecutor's Office, were the torturers and the interrogators, and there were no ordinary citizens amongst them. By telling such lies against Iran's resistance (movement), the Regime is trying to fight back the waves of joy and enthusiasm with which the public received the news of the punishment brought upon the torturers and executioners.

The Speaker of the Parliament of the Mullahs, claimed that the dead man was an engineer working at the Prosecutor's Office. The Regime's television network, said that he was a labourer, working in that Office, and one of the Regime's radio channels announced that he was one of the residents in the area. However, the priests and our Christian fellow-countrymen know nothing of this issue, and the body was brought to the church by some Government officials.

Considering that all religious minorities, including priests and our Christian fellow countrymen constantly suffer prejudices and suppression, and because of their religious

beliefs, are barred from holding many offices, it is indeed surprising to learn that an Armenian citizen worked at the Islamic Revolution's Public Prosecutor's Office. This is totally unprecedented in the 20-year history of the Regime of the Mullahs, and does not fool anyone in the country, especially when the Regime's record of murdering Christian priests, and blaming the MKO for it, is known to all.

It should be noted that in the commemoration ceremony held for the deceased, at the Armenian church in Tehran, yesterday, parts of which were also broadcast on the national television, the majority of the participants were members of the IRGC and the agents of the Ministry of Intelligence.

169. Further, Mr. Fender exhibited a letter to the UK Foreign Secretary dated 19 June 1998 from Mr. Mohaddessin (a witness in both the original appeal and the current appeal, to whose evidence we refer in some detail below) on NCRI headed notepaper [3A/5/226] in which Mr. Mohaddessin said:

On June 2, in three major operations, Mojahedin forces attacked the most important centers of suppression and terrorism of the religious, terrorist dictatorship ruling Iran. These centers play a critical role in torturing and executing political prisoners and suppressing public uprisings. Reports from across the country indicate widespread support by the Iranian people for these operations and a boost in public morale to resist the clerics.

170. The Appellants relied on paragraphs 178 to 180 of the 1st Witness Statement of Mr. Mohaddessin dated 21 August 2002 in the First Appeal [5/B1/1] in which he stated as follows:

178. June 1998 alleged bomb in a Tehran court. The PMOI has never placed a bomb in any court. The "court" referred to here was in fact the centre of the revolutionary prosecutor, who often acts as both prosecutor and judge, and who hands down sentences, which are often death sentences. This centre of the revolutionary prosecutor was one of the main locations of the oppression against the Iranian people.

179. In this incident, which took place on 2 June 1998, only one person was killed. In a death notice published on 9 June 1998 in the official state-run newspaper (Jomhuri-e-Eslami), he was identified by the regime as Haj Hassan Saleh. I attach a copy of the death notice at Tab 44 (Bundle C). The report confirms that Salehi had been one of the original Revolutionary Guards and had carried out sentences issued by the revolutionary prosecutor relating to political prisoners in Evin prison.

180. Haj Hassan Saleh had been a member of the Revolutionary Guards from its creation in 1979, and who had not only tried defendants and sentenced them to death, but also personally carried out death sentences, as well as torture of prisoners. He was probably the "security guard" referred to in the Secretary of State's statement. As to the "Armenian technician", an Armenian was killed in another incident elsewhere in Tehran, which was nothing to do with the PMOI. On the day of this incident the regime announced that a six-year old boy had also been killed in the same incident. The next day the story changed to a nine-year old. Later, the child seems to have disappeared from the reports altogether.

171. As can be seen from a review of that material, there was no doubt that an attack took place on 2 June 1998 for which the PMOI claimed responsibility. There was evidence from two different western news agencies and the British

Embassy which identified the building attacked as a “Court”, with other documents identifying it as the Public Prosecutor’s Office. In their contemporaneous statements, the PMOI not only claimed responsibility for this and the other two attacks that were carried out on 2 June 1998 but asserted that, in the attack on the Public Prosecutor’s Office, “*tens of torturers and interrogators were killed and wounded*”. This is to be contrasted with Mr. Mohaddessin’s witness statement in August 2002 in which he asserted that only one person had died and where he sought to portray that person as a leading torturer employed by the Iranian government. The PMOI’s original statement was, however, consistent with the contemporaneous news agency reports that were referred to by the British Embassy. In the statement of 4 June 1998, the PMOI denied that an Armenian labourer had been killed but it is clear that there was a funeral at an Armenian church and there was reporting that he had been killed as part of the bombing. In Mr. Mohaddessin’s witness statement in August 2002, he asserted (without producing any corroborating evidence) that the “Armenian technician” was killed “*in another incident elsewhere in Tehran, which was nothing to do with the PMOI*” which in itself contrasts with the statement by the PMOI at the time that it had been responsible for all of the three incidents that were reported to have occurred on the day, a claim repeated by Mr. Mohaddessin himself at the time in his letter to the Foreign Secretary.

172. In the above circumstances it is impossible to conclude that the Secretary of State did not have reasonable grounds for reaching the conclusion about the June 1998 incident as set out in Mr. Fender’s witness statement. It also illustrates the tendency of the PMOI witnesses relied on by the Appellants to expect that everything they say will be taken as true to the exclusion of all other material and of the fact that the PMOI version of events appears to an objective observer often to change to suit the particular interests at the time.
173. A further example is afforded by an incident that Counsel for the Appellants concentrated on in his submissions before us, namely the statement in paragraph 29 of Mr. Fender’s 1<sup>st</sup> Witness Statement that, in August 1998, the PMOI claimed responsibility for the assassination of a former Chief

Prosecutor of Iran, Assadollah Lajevardi and that “*Lajevardi’s brother and a bystander were reportedly killed*” [1/D1/6].

174. This was supported by a two telegrams from the British Embassy in Tehran dated 24 and 25 August 1998 [3A/5/238 and 240] which stated, amongst other things:

On 23 August Assadollah Lajevardi, former head of the Prisons Organisation and his brother were assassinated in their shop in the Tehran bazaar by two gunmen. A by stander was also killed. The police cordoned off the bazaar and at least one of the assailants was captured by the crowd and arrested. The MKO have apparently claimed responsibility outside Iran.

And

[In] August I had the opportunity to talk about Lajevardi’s assassination with an Iranian contact who is well-known to be in touch with at least parts of the security and intelligence apparatus. My contact was in no doubt that the MKO had indeed been responsible for the assassination. Their claim of responsibility had come too quickly after the event (put by the local press at 11:20) for it to be opportunistic.

Although we do not set out the details, the telegrams also confirmed that Mr. Lajevardi had “*a particularly bloody record during the early years of the Revolution*” been responsible for executing political criminals.

175. As with the previous example, the documents exhibited by Mr. Fender included a statement issued by the PMOI which put forward the PMOI’s version of events. In a statement issued by the PMOI on 23 August 1998 [3A/5/236], the PMOI stated:

Assadollah Lajevardi, the infamous “Butcher of Evin”, who was accompanied by a special group of bodyguards made up of Revolutionary Guards and armed agents of the notorious secret police, the Ministry of Intelligence, was killed at midday today in an operation carried out by Mojadedin’s Resistance units in Tehran.

One of Lajevardi’s bodyguards was also killed and several other armed agents were wounded. After an intense clash, the Resistance units overcame the heavily armed bodyguards who opened fire on them from several directions and left the scene.

...

Following today’s operation, the clerical regime immediately sent in large contingents of Revolutionary Guards and Intelligence Ministry agents to the area to seal off the Bazaar...Several people have been arrested...

The news of Lajevardi’s death in one of the most crowded Tehran districts spread rapidly...

Lajevardi continued his crimes under various covers and one of them was located in Tehran’s Bazaar.

176. Once again, the Appellants now rely on Mr. Mohaddessin's 1<sup>st</sup> Witness Statement in the First Appeal [5/B1/67] where he said:

181. August 1998 I accept that the former chief prosecutor of Iran (Assadollah Lajevardi) was shot and killed during a clash between him and the PMOI. I attach a copy of the PMOI press release relating to this incident dated 23 August 1998 [i.e. the same one exhibited to Mr. Fender's statement].

182. Lajevardi was known as the "Butcher of Tehran" because he was also head of the most infamous Iranian prison, Evin, and had personally tortured and executed many prisoners and sexually assaulted many female prisoners. He also made it a common practice to torture prisoners in front of their parents, spouses and/or children. Many Iranians will still remember his appearance on state television on 8 February 1982 slapping the infant son of Massoud Rajavi, who was the sole survivor of the attack in which his mother, Mr Rajavi's deputy and 18 other PMOI members were killed...The other two people killed in August 1998 were Lajevardi's bodyguards, not his brother or a bystander, as alleged.

183. Two members of the PMOI group who took part in the attack were arrested. One of them, Ali Akbar Akbari, who was 20 years old, was tortured to death. The other, Ali Asghar Ghazanfarpoor, aged 26, was tortured and executed some months later.

177. Counsel for the Appellants invited us to conclude on the basis of this that, contrary to the statement in Mr. Fender's witness statement, it was not reasonably open to the Secretary of State to conclude that a civilian (the alleged bystander) was killed.
178. In our view there was ample support for the Secretary of State's conclusion. There was no dispute that the PMOI carried out the attack. There was no dispute that the attack was carried out in the Bazaar – i.e. a place crowded with civilians, indeed the PMOI themselves described it as "*one of the most crowded Tehran districts*". The British Embassy report and the PMOI claim at the time both appear consistent in that the Iranian police sealed off the area very quickly and the British Embassy report that at least one of the assassins was arrested at the scene is consistent with Mr. Mohaddessin's witness statement that two of the members of the group who took part in the attack were arrested. The evidence was consistent that either one or two other persons in addition to Mr. Lajevardi were killed. The only question is whether they were his brother and a bystander as reported by the British Embassy or Iranian intelligence personnel acting as bodyguards (as claimed by the PMOI at the time). It is impossible to conclude that there were no grounds for the conclusion that it was the brother and a bystander

(particularly given the attack was carried out in a bazaar in one of the most crowded districts of Tehran) as opposed to military/intelligence personnel acting as bodyguards, still less for the actual conclusion expressed by Mr. Fender that “Lajevardi’s brother and a bystander were also *reportedly* killed”.

179. The final example that we would give is the conclusion in paragraph 23 of Mr. Fender’s 1<sup>st</sup> Witness Statement that the PMOI had historically been responsible for attacks on Western interests including US Citizens **[1/D1/5]**. Counsel for the Appellants took issue with this suggestion. The Appellants pointed to lengthy evidence from Mr. Mohaddessin in his first and second Witness Statements in the First Appeal (we were specifically referred to paragraphs 155 to 162 in the first Witness Statement and paragraphs 39 to 45 and 324 to 364 in the second **[5/B1/58 and 5/B3/189]**) and in his evidence in the current proceedings, together with a witness statement from Professor Raymond Tranter, a faculty member at Georgetown University and the University of Michigan **[1/C10/125]**. We do not set out this extensive evidence. By way of a very short summary (which is not intended to cover all of the points raised), in the witness statements in the original appeal, Mr. Mohaddessin argued that the PMOI had been infiltrated by a Marxist grouping who took advantage of the original leaders’ imprisonment (or execution) by the Shah who he claimed were responsible for carrying out the attacks in question and which he asserted should not be attributed to the PMOI itself. Professor Tranter says in his evidence that his research and reports from other experts “*have proven to be unfounded*” the allegation that the PMOI was involved in killing US personnel in the 1970s.
180. The Respondent, however, exhibited a number of documents in support of Mr. Fender’s evidence in paragraph 23 of his 1<sup>st</sup> Witness Statement. These included a very detailed US House of Representatives Report dated October 1994 (running to 44 pages) on the PMOI **[3A/5/1]**. We note in passing that the authors formed a similar view to ourselves of the PMOI’s approach to people who did not accept everything that they said as being absolutely true, saying “*The Mojahedin for their part, often dismiss their critics as ‘agents of the regime’*”. We also note that the question of the absence of proof for claims

by the PMOI that the organisation had renounced violence, particularly given their long involvement in terrorist violence, were then, as now, something which bedevilled any assessment of their activities:

Despite Mojahedin assertions that the group has abandoned its revolutionary ideology and now favors a liberal democracy, there is no written or public record of discussion or debate about the dramatic reversals in the Mojahedin's stated behavior. Moreover, the Mojahedin's 29-year record of behavior does not substantiate its capability or intention to be democratic...

181. The main point for present purposes is that, whatever the intensity of review that is applied to that document alone, it clearly affords reasonable grounds for the beliefs and conclusions set out in Mr. Fender's witness statement. We say that conscious of the fact that, in paragraph 7 of Mr. Mohaddessin's first witness statement in the First Appeal (which was not expressly drawn to our attention) he disputed the accuracy of what we understand to be the same report and produced material from NCRI in opposition to it. The Appellants, the PMOI and, indeed, Professor Tranter may not agree with the conclusion in the report. In our view it is impossible to say that the Secretary of State could not properly rely on it.
182. As will be apparent from these examples, in our view, there are reasonable grounds for the beliefs and conclusions expressed in Mr. Fender's 1<sup>st</sup> Witness Statement as to the nature and extent of the PMOI's involvement in terrorist activities up to and including 2001. Although not directly relevant to the issues in the present appeal, it would also have led to the conclusion that there were reasonable grounds for the belief of the Secretary of State that the PMOI was concerned in terrorism at the date that it was originally proscribed, namely 29 March 2001. Indeed at that time, the PMOI was actively "concerned in terrorism" within the definition of the Act and, on the material that we have seen, it would have been perverse (in the public law sense) for the Secretary of State to have concluded otherwise at the First Stage.
183. It follows that, we agree with the submission made on behalf of the Respondent that the statement in paragraph 24 of the current Application for Deproscription that "*the Applicants recognise that the PMOI engaged in some military activity, against the Iranian regime, prior to June 2001*" very

significantly underplays the true nature of the organisation's activities up to that time.

**(v) 2001 and 2002**

**(a) Introduction**

184. In our view the core of the Secretary of State's consideration of the current application for deproscription demonstrates a misleading preoccupation with the question of whether there was any public statement evidencing the alleged change in policy in June 2001. This arose from paragraphs 27 and 28 of the Application for Deproscription [1/B1/9] in which the Appellants asserted:

27. The PMOI's permanent cessation of any military activity is the result of a deliberate choice to abandon all military action and instead to use political will as a means of bringing about freedom and democracy in Iran. Taking account of domestic and international circumstances, the PMOI decided at an extraordinary Congress held in Iraq in June 2001, to put an end to its military activities in Iran (i.e. to all its military activities). The decision taken by the extraordinary Congress was ratified by the two ordinary congresses organised in early September 2001 and 2003. This policy has been stated publicly and the PMOI's leadership and membership signed statements to this effect.

28. It is generally accepted that the PMOI's military activities within Iran were organised by the organisation's internal branch there. Although independent in its activities, this branch nevertheless conformed to the decisions of the extraordinary Congress, thereby completely halting its operations. As a result, the internal branch lost its *raison d'être* and was definitively dissolved. This, together with the PMOI's conduct during the Second Persian Gulf, is an indicator of the level of restraint and discipline of the organisation and its members.

185. Having considered all of the material we are satisfied that there are no *public* statements of a decision taken in June 2001, at least not in the wide and unequivocal terms asserted by the Appellants, making it clear that a deliberate decision had been taken to cease all types of violent action against the Iranian regime, both inside and outside Iran and that the PMOI had renounced all forms of violence in favour of a purely peaceful, political campaign.

186. The Secretary of State and his advisers have fastened on the absence of such public statements, together with other exceptionally serious but, on the evidence before us, completely ill-founded claims of collusion between the UK, the USA and Iran, for example, to bomb PMOI bases, as fatally

undermining the Appellants' application. The former preoccupation led in our view to a failure to take proper account of the wider picture disclosed by the material, and to ask whether, in the light of that material, the PMOI does indeed still satisfy the requirements of the 2000 Act at the First Stage.

187. As we set out more fully below, the focus of the Secretary of State on the application and on this Appeal was very much to rebut the particular contentions put forward by the Appellants rather than to address the true and much wider ambit of questions required by the terms of the 2000 Act.

(b) A change in approach by the PMOI

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

189. First, as Mr. Fender set out in paragraph 40 of his 1<sup>st</sup> Witness Statement **[1/D1/9]**:

In June 2001, the PMOI claimed responsibility for four rocket attacks on the government building in Tehran 'inflicting heavy casualties and damages on the enemy' claiming that these 'operations raise to 96 the number of operations by Mojahedin operational units in Tehran and other parts of the country since the beginning of the Iranian year.

190. In paragraph 8 of the Decision Letter **[1/B3/41]**, the Secretary of State explained that the relevant period was from 20 March 2001 to 25 June 2001 – i.e. there were 96 claims of responsibility for violent attacks inside Iran in a three month period. This followed a familiar pattern in which the PMOI had historically claimed responsibility for large numbers of attacks each year, with a AFP report on 29 July 2001 **[3A/5/297]** recording NCRI as claiming that "*the resistance had carried out 261 military operations inside Iran during the past year*".

191. In the period July to August 2001, there were three PMOI claims that its operatives had carried out military attacks inside Iran. In 2002, there was one such claim (in May 2002) albeit it was almost immediately withdrawn and stated to be an error. We will return to that claim below. Apart from the claim in May 2002, since the end of August 2001, there have been no such claims.
192. Thus, an organisation which had consistently claimed responsibility for large numbers of violent terrorist attacks on Iranian interests inside Iran each year for a number of years, including 96 in a three month period in early 2001, simply ceased to claim responsibility for such attacks at all, and has conspicuously not claimed any responsibility for such attacks in the 5 years immediately preceding the Decision Letter or indeed to date.
193. There was, of course, the claimed and retracted attack in May 2002. Even if that attack is taken into account it is clear that the PMOI had not claimed responsibility for any attacks for more than 4 years before the Decision Letter.
194. Second, as we will set out in more detail below, there is no open evidence of any terrorist attacks inside Iran that anyone has attributed to the PMOI since August 2001 (excluding the May 2002 claim).
195. Third, one of the matters that was of considerable importance to the Respondent's case before us, was whether or not the PMOI are (or were at the date of the Secretary of State's refusal to deproscribe in September 2006) maintaining a military command structure and network of military operatives in Iran. As we have already indicated, Mr. Fender placed considerable reliance on the assessment of the Middle East & North Africa Research Analyst's Group of the Foreign & Commonwealth Office set out in their report of March 2001 entitled "A history of the PMOI" [Document 8 at **3A/5/84-94**]. In his 1<sup>st</sup> Witness Statement [**1D/1/15**] Mr. Fender said of this detailed report "*I assess that this remains a generally highly reliable account*". That generally highly reliable account stated at paragraph 13 as follows:

The Iranian government continues to regard the MKO as a serious security threat, although it is unpopular and has limited military and subversive capability. The scale and mode of MKO operations suggest that its claim to have a military command inside Iran is probably untrue, but it must have well-equipped and well-managed cells in large cities to support operatives who infiltrate from Iraq to carry out attacks, and to spread MKO literature, recruit sympathisers and gather information on regime activities (Katzman). The MKO has never had sufficient strength or support to threaten the regime.

196. Our attention was not drawn to any material in the open evidence relied on by the Respondent that contradicted that formal and “highly reliable” assessment at any time after March 2001. Obviously this is significant when it comes to assessing both the effect of the disarmament of the PMOI in Iraq (whether that was voluntary or otherwise) and whether there are reasonable grounds for believing (as the Secretary of State contends) that the PMOI has indeed maintained a military command structure and capability in Iran even now.
197. In this context, it is necessary to consider in more detail below the statements of Mr. Mohaddessin and others in the First Appeal. The fact for present purposes is that, from the time when the PMOI was undoubtedly actively conducting military operations inside Iran (that is March 2001), the report that Mr. Fender regards as remaining “*generally highly reliable*” concluded, from a detailed review of the nature and operations of the PMOI over many years, that there probably was no military command structure inside Iran and that the operatives who carried out the attacks were based in Iraq.
198. Fourth, the nature of the rhetoric and propaganda issued by the PMOI changed. As Mr. Fender set out in paragraph 40 of his 1<sup>st</sup> Witness Statement, in 2002 there were three occasions relied on by the Secretary of State when publications of the PMOI reported on protests inside Iran. It is instructive to set out the extracts from the full text of the three reports relied on by the Secretary of State:

198.1. The Press Office of the PMOI in Paris issued a statement dated 21 March 2002 [**3A/5/318**] saying:

Two main centers of suppression in central and southern Tehran were pounded on Wednesday evening in a series of operations by disenchanted youths...The sound of explosions could be heard over a wide area of South Tehran. Revolutionary Guards

and intelligence and security agents rushed to the scene and searched all the passers-by and cars, but to no avail.

**198.2. The Press Office of the PMOI in Paris issued a statement dated 25 April 2002 [3A/5/321] saying:**

At 11pm on Wednesday, April 24, 2002 disenchanted youths attacked a command headquarters of the suppressive State Security Forces and the intelligence centre associated with it, in Abuzar in Tehran's Seyyed Khandan district, south of the Ministry of Intelligence.

This operation was named "Ferdows Uprising" in solidarity with the people of Ferdows. Thousands of residents revolted against the mullahs from April 17 through 19, chanting "death to mullahs' rule" and "Iran has turned into Palestine."

Leaders of the mullahs' regime dispatched special anti-riot units of Revolutionary Guards from Tehran, Mashad and other cities to Ferdows in order to suppress the demonstrators. These forces brutally attacked the people, beating women, the elderly, and not even sparing pregnant women and children as young as eight and nine. Several residents were killed, and more than 50 wounded and hundreds were arrested.

**198.3. On 22 August 2002 a statement from "MKO Command Headquarter inside the country" was published in the PMOI publication 'Mojahed' [3A/5/329]:**

Around 2400 hrs last night, Wednesday 21 August 2002, a group of Tehran's revolutionary youths, attack IRGC Basij Headquarter of West Tehran located in Azadi Street...in two brave simultaneous operations and caused great damage to this centre of suppression and suffocation.

...

Destroying the command headquarter of the IRGC in West Tehran is a heated response to Basiji traitors so that they know that there is always a response to torture, whipping, killing and violating people in public.

199. Despite the submission of Counsel for the Respondent that these reports constituted "glorification" of terrorism within the meaning of section 3(5A) and (5B) of the Act so that they constituted reasonable grounds for believing that the PMOI "promotes or encourages terrorism" within the meaning of section 3(5)(c) of the Act, we note that the Secretary of State did not rely on them in the Decision Letter of 1<sup>st</sup> September 2006, they are not referred to in the Submission to the Secretary of State of the 25<sup>th</sup> August 2006 and Mr. Fender says of them in paragraph 40 of his 1<sup>st</sup> Witness Statement:

Subsequent PMOI material suggests that the group continued to carry out or condone violent attacks against the Iranian regime. PMOI statements of the time refer sympathetically to attacks. In several cases attacks are reported as part of a named operation or attributed – often implausibly – to ‘disenchanted youths’. The choice of words is strikingly similar to that previously used to describe attacks by the PMOI; the reported targets are also very similar.

It is to be noted that Mr. Fender does not expressly say that it formed any part of the Secretary of State’s decision that the three documents or statements cited above constituted “glorification” within the meaning of the Act.

200. What is striking about the reports is that there are so few of them, they move more towards a “supportive journalistic reporting” style of writing, and they do not claim direct responsibility for any of the activities (and one simply relates the story of a vocal but non-violent demonstration which was allegedly attacked by the Revolutionary Guards). This is in stark contrast to the previous quantity and type of claims. Apart from Mr. Fender’s evidence, there is no contemporaneous assessment in the open material that the attacks ever took place or that the PMOI were assessed to be responsible for them. Further, what is even more noteworthy is that the Secretary of State does not point to any further statements from the PMOI after August 2002.
201. On the material before us, it is clear that during a period of almost four years immediately preceding the decision to refuse to deproscribe, there were no statements issued by the PMOI as indicating it was condoning or supporting specific attacks inside Iran even if those attacks could be attributed to “disenchanted youths”.

(c) The alleged decision to cease military operations against Iran in June 2001

202. As we have already indicated, the question of whether or not a positive decision was taken by the Leadership Council of the PMOI in June 2001 and ratified at an extraordinary congress of the PMOI in either June or July 2001 (and subsequently ratified at ordinary congresses twice, in September 2001 and September 2003) and then declared publicly, clearly played a predominant role in the decision-making exercise conducted by the Secretary

of State and his advisers and occupied a considerable part of the evidence and submissions before us.

203. Paragraphs 27 and 28 of the Application to Deproscribe have been set out above. These may have set the forensic hare running. They led directly to the Secretary of State's statements in paragraphs 9 to 13 of the Decision Letter [1/B3/41]:

9. By its own admissions, the PMOI/MeK had been committing extensive acts of terrorism as recently as June 2001. If I am to be persuaded that such an organisation is no longer "concerned in terrorism" for the purposes of section 3(5) of the 2000 Act, I would expect (at least) a clear, voluntary, renunciation by its leadership of the organisation's involvement in terrorism, together with a voluntary abandonment of its arms by its members. Neither the account of events in the document in support of the application nor the information otherwise available to me indicates that this has happened.
10. In paragraph 27 of the document in support of the application, it is stated that:  
"Taking account of domestic and international circumstances, the PMOI decided at an extraordinary Congress held in Iraq in June 2001, to put an end to its military activities in Iran (i.e. to all its military activities). The decision taken by the extraordinary Congress was ratified by the two ordinary congresses organised in early September 2001 and 2003. This policy has been stated publicly and the PMOI's leadership and membership signed statements to this effect".
11. I note that, in spite of the assertion in paragraph 27 that "this policy has been stated publicly", no documents are annexed to the application recording publicity being given to the new policy. As I have already stated, I am not otherwise aware of any such new policy on the part of the PMOI/MEK. An Agence France Presse report of the 29<sup>th</sup> July 2001 reporting a three-day congress of "the coalition of Iranian opposition, dominated by the armed People's Mujadeen movement" made no reference to a decision to end the armed struggle, but did report a statement claiming that 261 attacks had been carried out in the previous year and that "military operations exacerbated the mullahs' factional strife and deepened its internal crisis".
12. In assessing the weight that can properly be attached to what is now said to have taken place at the "extraordinary Congress held in Iraq in 2001" I have also had regard to the fact that, when in 2001 the PMOI/MeK sought to challenge the refusal by the then Home Secretary to deproscribe the organisation, no mention appears to have been made of this Congress or of any decision taken (either then or at any other time) to end "military activities" in Iran. The evidence relied on by PMOI/Mek at that time appeared to be to the contrary: for example in a signed statement dated 20<sup>th</sup> February 2002, on behalf of PMOI/MeK, Mohammed Mohadessin (sic) stated "... the PMOI has a military wing and a social network in Iran and representative offices throughout the world. It is not the only member of NCRI which resorts to armed resistance." The language used there is clearly inconsistent with the suggestion that with effect from June 2001 the PMOI/MeK had formally abandoned its commitment to the use of terrorist methods.
13. Looking at the matter as a whole, and even though I accept that during the period between Summer 2001 and Spring 2003, the number of attacks claimed by the MeK declined substantially, I do not accept the contention that PMOI/Mek has voluntarily or unequivocally renounced the used of terrorism. As I have stated above, your application provides no evidence in support of the contention that any such statement or definitive statement has been made, there is no such information available to me, and the statements made on behalf of the PMOI/MeK both in 2001 and in 2002 would appear to be contrary to the contention advanced in your application."

204. As we have also indicated, Counsel for the Respondent made it clear in his submissions before this Commission that the Secretary of State remained of the view that it was an essential precondition to deproscription that the PMOI leadership made a clear, voluntary and public permanent renunciation of all forms of violence outside these proceedings.

205. As recorded in the Decision Letter above the Application for Deproscription **[2 /paragraph 27]** had asserted the existence of the June 2001 decision and the two ratifications in 2001 and 2003. Notwithstanding the reams of material provided with the application, and as noted by the Secretary of State, nothing was provided in the Application to support these assertions. The Paragraph simply said that the policy had been stated publicly and the PMOI's leadership and membership signed statements to this effect (the latter clearly being a reference to the documents signed after the handover to the Coalition Forces in 2003 and 2004 referred to below). Further, at Paragraphs 29 and 30 reference was made to two speeches by PMOI Secretary Generals, but no material was provided in support of the content of those speeches.

206. As will be apparent from the passages from the Decision Letter set out above, in Mr. Mohaddessin's witness statement of the 20<sup>th</sup> February 2002 (a) Mr. Mohaddessin described military activities by the PMOI in the present tense, indicating that there was an on going military operation inside Iran, with an operational command structure and (b) made no reference to the alleged decision to cease all military activities against Iran in June 2001 which had been ratified by an Extraordinary Congress in September 2001.

207. Furthermore:

207.1. In paragraphs 79 and 80 of his 1<sup>st</sup> Witness Statement in the First Appeal dated 21 August 2002 **[5/B1/29]**, Mr. Mohaddessin said:

79. ...  
The branch responsible for affairs inside Iran: This branch, which is the largest, comprises several sections including: social section, humanitarian

affairs sections, a section responsible for looking after the families of martyrs and political prisoners and so on. The main task of this branch is to organise anti-government protests, and other social and publicity activities and to help the families, many of whom are children, of executed and political prisoners. A large part of the activities of this branch relates to gathering information inside Iran on the atrocities committed by the regime...It has also been instrumental in gathering information and intelligence enabling the PMOI to expose the clerical regime's terrorism outside Iran and its efforts to acquire weapons of mass destruction.

80. The Operational Units of the Mojahedin inside Iran (or OUMI) act independently of all of the other constituent PMOI branches. It was originally set up by members and sympathisers of the PMOI in order to defend themselves against the brutal onslaught of the regime. It follows strictly the general guidelines and principles of the PMOI. As far as its military activities are concerned, the OUMI adheres fully to international norms and regulations governing military conduct, particularly the Geneva Convention of 1949.

**207.2. In paragraphs 107, 111 and 113 of the same Witness Statement [5/B1/39], he said:**

107. The NLA has transformed itself from an infantry force into an efficient, experienced, fully armoured and powerful army that poses the greatest single threat to the religious fundamentalist dictatorship in Iran. Many foreign journalists have visited the bases of the NLA. On 30 December 1996, in an article entitled, "*Mullahs, Look! Women, Armed and Dangerous*"...Douglas Jehl of the New York Times wrote:

*"The army, now some 30,000 strong, is by any measure the best-armed opposition force poised outside any country's borders. With raids deep into Iran in 1988...it equipped itself with some \$2 billion worth of weapons, including American-made armoured personnel carriers and British-made Chieftain tanks..."*

...

111. Since 1988, the NLA has only been engaged in fighting with the Iranian regime's military units when the latter have attacked the NLA on Iraqi territory. All these engagements were initiated by the Iranian regime's armed forces and the NLA, in each case, has acted in self-defence. Military operations by the PMOI's operational units in Iran have nothing to do with the NLA. They are planned and carried out by the PMOI's Command inside Iran.

...

113. At paragraph 14, the Secretary of State also refers to "[t]he MeK's use of violence". The statement is vague because it does not specify the target of the alleged violence. Moreover, the word [sic] "violence" is misleading, because it is used without regard to the context of Iranian politics. The PMOI is engaged in a war of liberation, which as I have explained above, was imposed on it when all other avenues of peaceful activities were blocked off by the regime. The PMOI's military activities must be seen in the context of a war of liberation, and the internationally recognised rules that govern such conflicts. Actions that are considered as "violence" in a democratic or civil society and are dealt with as criminal acts, do not constitute "violence" when they are carried out in a war.

**207.3. In paragraphs 4 to 15 of the 2<sup>nd</sup> Witness Statement of Mr. Mohaddessin dated 13<sup>th</sup> November 2002 [5/B3/100] in the same appeal, he stated:**

4. The PMOI is a democratic organisation, with a wide following amongst Iranians, both inside Iran and around the world, and amongst non-Iranians who have become familiar with the PMOI's aims and work. This is clear from the many demonstrations organised by Iranians all over the world, during the last 20 years, both in support of the PMOI and against the Iranian clerical regime. These demonstrations have been attended by thousands of Iranians...
- ...
6. The PMOI is also a legitimate resistance movement. The PMOI is engaged in a legitimate struggle to achieve the overthrow of an extremely oppressive regime. The PMOI is also part of a wider movement that is seeking the overthrow of the current Iranian regime.
7. The Iranian clerical regime is a regime which has committed countless crimes against humanity on its own citizens, which has committed and/or sponsored numerous acts of terrorism around the world. It maintains itself in power through fear, repression and the denial of basic democratic freedoms.
8. The aim of the PMOI is to achieve democracy and respect for universal human rights and freedoms in Iran.
9. Although the PMOI acknowledges that it took up arms as part of its political struggle, I wish to stress that this was an option of last resort for the organisation. The PMOI only pursued this course when all avenues of peaceful protest against the Iranian clerical regime were blocked off, and when its very existence as a political organisation was prevented by the Iranian clerical regime. The Preamble to the Universal Declaration of Human Rights speaks of having "recourse as a last resort to rebellion against tyranny and oppression", and it is in this context that the PMOI's decision too take up arms should be viewed.
- ...
11. The Iranian clerical regime is well-known around the world as a repressive regime, which stifles freedom of speech and other human rights and freedoms, and where torture and barbarism towards citizens has the sanction of the state, or indeed is actively promoted by it...
12. The PMOI's position has consistently been, since it was forced to take up arms, that it would cease all operations if truly free and fair elections were held under international supervision in Iran...
13. The PMOI attacks only military targets, or institutions or persons which are directly responsible for committing crimes against humanity. The PMOI does not attack civilians or civilian institutions. The PMOI plans its operations very carefully so that no civilians are placed in any danger as a result of its operations. The definition of a legitimate target used by the PMOI is consistent...with (and, in fact, narrower) than that used by NATO and in the context of other conflicts.
14. I contend that, as a legitimate voice of dissent in Iran, the PMOI should not have been proscribed.
15. Indeed, there are other groups, also engaged in armed struggle against repressive regimes where peaceful protest is not possible, which have not

been proscribed even though they may also fall within the broad definition of terrorism in the Act...

He then included a discussion between paragraphs 207 and 221 of what, in the PMOI's view, constituted a legitimate military target;

207.4. At paragraph 6 Mr. Hossein Abedini stated in his 1<sup>st</sup> Witness Statement dated 20 February 2003 in the First Appeal [5/B4/207]:

6. I should say by way of preface to my remarks concerning these organisations/groups, that nothing in this statement is intended to represent any acknowledgement that the PMOI's goals, objectives or ways of achieving these, are in any way similar to any of the organisations discussed. On the contrary, the PMOI has consistently refrained from taking any action that would harm civilians, whether directly or indirectly, and in its use of the armed struggle, to which it was driven as a last resort, and which forms only a part of its activities, the PMOI adheres to, for instance, international definitions of what is a "military target"....

208. Counsel for the Respondent submitted that the omission of any reference to the alleged decision in these witness statements was striking, if such a decision had indeed been taken, not least as they were made shortly after the decision was alleged to have been taken.

209. Counsel for the Respondent submitted that it is therefore even more remarkable that in the Notice of Appeal [1/B6/51 at 53] the Appellants state at paragraph 6 : *"Further, there was no factual basis upon which the Secretary of State could reject or cast doubt on the evidence presented to him that the PMOI had renounced terrorism and rejected violence."* We note that at the date of the Notice of Appeal no evidence had been provided in support of the asserted **public** statements (that is the two speeches referred to – let alone evidence of the decision and its subsequent ratification). At paragraph 19.1 reference was again made to the unpublicised statement of the PMOI Secretary General of February 2006.

210. The absence of this evidence was clearly an issue that the Appellants would have to address with evidence on any appeal.

211. Subsequently the Appellants served evidence in reply.
212. Mr. Mohaddessin (who now describes himself only as the Chairman of the Foreign Affairs Committee of NCRI) **[1/C4/45 at 57 and 59]** and Mr. Barai (who describes himself as a senior member of the PMOI and an advisor to successive PMOI Secretary Generals since 1993) **[1/C2/29 at 30-31]** both gave witness statements in the present proceedings on behalf of the Appellants which asserted that the decision had been taken in 2001.
213. We note that Messrs Bindmans complain (letter 2<sup>nd</sup> August 2007) that Mr Mohaddessin is wrongly described by Counsel for the Respondent as “a senior official from PMOI” and Counsel for the Appellants submits (3<sup>rd</sup> August 2007 Reply to Respondent’s Note of 31<sup>st</sup> July 2007) that Mr Mohaddessin is “not a representative of PMOI”. In his evidence in the First Appeal (**[5/B1/1]**) Mr Mohaddessin stated that, in addition to being the Chairman of the Foreign Affairs Committee of the NCRI, he had been a member of the PMOI for 28 years and that he was authorised to make his statement on behalf of the PMOI. Mr Mohaddessin does not now make clear in his evidence precisely what status or position he has within the PMOI or how he has obtained any direct or indirect knowledge of matters relating to the PMOI and its internal workings; he does nevertheless appear to speak on behalf of the PMOI and with its authority. We are surprised that he is now said not to be a representative of the PMOI, however this stance serves to emphasize the difficulties that the Secretary of State and those considering these issues have in relation to matters relating to the PMOI. Facts relating to the PMOI which might in other circumstances appear to be obvious and uncontroversial are not clear when the whole of the available evidence is considered.
214. Mr. Barai said in paragraphs 4 to 6 and 11 of his 1<sup>st</sup> Witness Statement **[1/C2/30]**:
4. In paragraphs 26 and 27 of the Application, reference is made to the decision by the PMOI in June 2001 to end its military activity. I confirm that in June 2001 the PMOI Leadership Council decided to put an end to its military activities. The decision was discussed and confirmed by the membership at an Extraordinary Congress held in Ashraf City, Iraq in late June 2001. I was present at the Congress.

5. Subsequently, in July 2001, the PMOI Leadership Council implemented the decision by communicating an instruction to all the operational units of the PMOI in Iran and all other PMOI members. They complied with this instruction when it was communicated to them, although difficulties of communication meant that it took a few months before all members could be informed. From then on, all PMOI members and activists inside Iran concentrated on expanding the network of supporters and stepping up political and social activities. This network of supporters is responsible for hundreds of anti-regime protests and strikes each month, as well as the gathering of information concerning the regime's human rights abuses, its acts of state terrorism and particularly its nuclear projects.
6. Although the PMOI ordered all its members to put an end to all military operations, overriding considerations relating to the safety of PMOI members in Iran made it necessary to refrain from making the decision public. Making such an announcement without first taking the necessary security precautions would have placed members and sympathisers, ninety percent of whom had played no role in military operations, in extreme danger. It would have prompted the Iranian regime to concentrate on arresting or killing PMOI members instead of focusing on taking measure to prevent and neutralise the PMOI's military operations. Thus, at the same time as it ended its military operations, the PMOI had to put in place measure to provide safe and secure living arrangements for its members and activists in circumstances where it no longer carried out any operations. This extremely difficult undertaking required a considerable period of time, in particular given the repressive measures being taken against the PMOI members within Iran. These considerations explain why the documents provided to the Secretary of State and to the Commission as part of the application for deproscription made by the PMOI in 2001, as well as the witness statements of Mohammad Mohaddesin and Hossein Abedini in 2002, made no reference to the Leadership Council or the PMOI Congress.
- ...
11. Although the decision to end military activity was put into effect across Iran in July 2001, I have explained that communication difficulties meant that a number of members did not receive the message for a few months. For this reason, a number of military operations were carried out in the few months following the decision. Consistent with its transparent policy, the PMOI accepted responsibility for those operations in a series of statements issued at the time. Since then, the PMOI has not conducted any military operations inside Iran nor has it retained any military structure or any weapons inside Iran.

**215. This was supported by a statement from the current Secretary of General of the PMOI, Madame Sedigheh Hosseini who stated at paragraph 5 of her Witness Statement [1/C3/41] dated 29<sup>th</sup> April 2007:**

5. At its extraordinary session in June 2001 held in Ashraf City, Iraq, the PMOI's Leadership Council decided unanimously to put an end to all the organisation's military operations and to put that decision into effect in July 2001. I was present at the extraordinary session of the Congress when the Leadership Council made this decision and at which it was discussed with and approved by the membership. I can confirm that the Leadership Council put that decision into force across Iran in July 2001. All PMOI members inside Iran immediately abided by that decision, except for a handful who were informed of this decision at some time later due to communication and security precautions and difficulties. After 2001, the PMOI no longer had a military structure inside Iran and was not involved in any military action, training, planning, intelligence gathering, retention or acquisition of arms, or encouraging or exhorting acts of violence by its membership.

216. Further Madame Hosseini stated at (in this version unnumbered) paragraph 10 [1/C3/42]:

In a speech I gave on 11 February 2006, I explained that the PMOI is opposed to and condemns any type of violence. I also announced the commitment of the PMOI to the call by the Iranian Resistance's President elect in October 2003 for a referendum. This remains our position and guiding principle.

217. Although this statement appears to be the only specific public statement of the decision now relied upon by the Appellants (and again despite the reams of material provided by the various witnesses) no documentary evidence of the precise terms of this speech in February 2006 appears in our bundles. The documents produced by Madame Hosseini can be found at [4A/3].
218. Thus, in the original round of evidence, the direct evidence (unsupported by any documents) from the current Secretary General of the PMOI and others was that the decision was made in June 2001 and was put into force in July 2001 and all PMOI members inside Iran "immediately abided by that decision" apart from a handful (i.e. those associated with the attacks in July and August 2001) who, it was said, did not get the message due to communication problems.
219. Furthermore Mr Barai exhibited the minutes of the September 2003 Congress, to which we will refer below.
220. The Appellants sought to counter the Respondent's submissions in relation to the absence of any reference to the decision in the evidence served in support of the earlier appeal by the PMOI, first, by adducing evidence in the 1<sup>st</sup> Witness Statement of Mr. Mohaddessin [1/C4/57] where he stated at paragraph 42:

At paragraph 7 of his witness statement, Mr Mehdi Barai as explained why it was not possible to make public the decision made at the Congress in 2001 to put an end to military action. I have read that statement and confirm that its content reflects the considerations, which were in play at the time. The reasons for not making the decision public applied to all statements made by PMOI officials of the Iranian Resistance, including my, and Mr Abedini's, witness statements to the Commission. It was for the same reason that my statement referred to the PMOI's military activities in the present tense. However, the fact is that at the time those statements

were made, the PMOI had made the decision to put an end to its military activities and was therefore not involved in any military activity.

221. As will be apparent from that paragraph, Mr. Mohaddessin was accepting that his evidence (and that of Mr Abedini) in the First Appeal was not true. This was then supplemented by the service (with our permission) of further evidence from Mr. Mohaddessin (his Third Witness Statement) [1/C4/60A] in which he explained in some detail Mr Barai's explanations as to why it was not possible to make public the 2001 decision to put an end to military action:

- 4 The PMOI's concern at the time was that statements provided to the Commission would be a matter of public record. In paragraphs 18 and 19 of his second witness statement Mr Fender states, "*For our part, we have taken the view that the fight against terrorism is an area where we share some mutual interests with Iran and offers some potential for co-operation. We have therefore been prepared to exchange information with Iran about the PMOI activity in the UK, Iran and Iraq, and to discuss our policy towards the group ... These discussions with Iran have taken place over a number of years.*" Although I cannot know, this exchange of information might have included the witness statements provided to the Commission in 2002 and reinforces the concern the PMOI then had.
- 5 I endorse the explanation given by Mr Barai in paragraph 6 of his witness statement. In the prevailing circumstances of absolute repression, provision of security precautions was by no means an easy undertaking, because it required enormous planning and resources. Documentation before the Commission shows that until 1981 all PMOI sympathisers were engaged in wholly peaceful and public activity. The PMOI at the time was not an underground movement and its members and sympathisers were therefore readily identifiable. However, when mass executions started in the summer of 1981 following a peaceful demonstration organised by the PMOI (please see exhibit 10 to my witness statement dated 21 August 2002), the organisation was forced to go underground. Therefore, following the June 2001 decision, members of the active units had to be reintegrated into society, with all that would entail, including jobs, homes etc. This had all to be done through the PMOI's support network to avoid those individuals being identified during the process, and involved a transition back from an underground to an open existence.
- 6 Like the decision to resort to armed struggle, the decision to end military operations was probably one of the most important political and strategic decisions the PMOI had made and its implementation presented a serious challenge for the organisation. It was a major decision which would have a very considerable impact on the organisation, its members and sympathisers. The PMOI had to consider, in particular, how to protect the safety and security of its members and sympathisers, and ensure a smooth and effective implementation of the decision. At the same time the PMOI wished to prevent the Iranian regime from taking advantage of the decision in a manner that would have adverse consequences for the organisation.
- 7 As such, the organisation had to exercise extreme prudence to pre-empt and prevent any political, social, security and organisational fall-out resulting from that decision. While this process was going on, the PMOI became caught up in, and necessarily diverted by, international events beyond its control.
- 8 Another important consideration was the need to ensure that all members (including those imprisoned), particularly those who had up to that point been involved in military operations or assisted the operational units, were fully informed of and convinced about the reasons and wisdom of the decision made by the organisation's leadership. Many had made enormous sacrifices and had loved ones imprisoned and executed by the Iranian regime. It was important that they and their families would not see the change of policy as a betrayal of their ideals and think that their sacrifice

might have been needless. The decision required particular explanation since they believed that their military activities at the time of the decision were supported by the people of Iran. A simple announcement of the ending of military activities could easily have led to the very perception the PMOI was trying to avoid. From a logistical and practical standpoint, and in the light of difficulties in communication and correspondence, the process of informing and convincing was by necessity a time-consuming and burdensome task given that contact had to be made with networks which were scattered across [Iran]. The PMOI needed to convince these people that this was the right course of action, one which many members and sympathisers, and even some senior officials, at first found very difficult to comprehend or digest.

9 Moreover, a premature announcement in the PMOI's view would have conveyed a position of weakness of the PMOI, perhaps triggering an all-out crackdown by the regime on the PMOI's network in Iran knowing that the organisation would not fight back. This could have resulted in a wave of arrests and/or executions. It was therefore decided that it was safer to re-integrate members without the potential extra dangers created by Iran especially looking for such reintegration in the wake of the announcement. This can only be understood in the light of the absolute repression inside Iran.

10 A sudden public announcement of the decision to end all military activity, without taking the necessary practical and political precautions, would have been counter-productive and might well have led to undesirable and imprudent reactions from certain units or individuals. For example, an immediate public statement risked creating several splinter groups which continued the military activities, because of their disagreement with the decision. The Iranian regime could also have capitalised on these potential splits through misinformation campaigns by for example setting up organisations claiming to be the PMOI and have them do and say whatever they want. The PMOI wanted to make sure that its decision was well understood by all military units and those who provided support to them, and that these people did not only agree then to end military activity, but would continue to abide by the decision. The matter had to be explained to the extent that was possible, and military units and individuals in Iran had to be given assurances that their safety and security would not be jeopardised. Therefore, the decision had to be implemented gradually and in a measured fashion. Therefore, a precautionary approach was taken on the basis that the less information that got into the hands of the Iranian regime the better.

11 As a result of this careful implementation, military units have since the summer of 2001 been efficiently dissolved without incident. This is a remarkable achievement which clearly demonstrates that the PMOI was right not to publicise its decision.

12 Further, a premature announcement would have provided the regime with an enormous source of propaganda, not only to boost the morale of its own forces but also to demoralise the Iranian people in general and PMOI sympathisers in particulars.

13 The process of informing and convincing members and supporters continued into 2002. By the summer of 2002, the threat of US military intervention in the region had become a matter of pressing concern: the PMOI was essentially concerned with preservation of the organisation and its member in Iraq. The whole geopolitical map of the region was about to go through seismic change and the PMOI was unwillingly in the middle of it. From the summer of 2002, therefore, the PMOI's concentration became avoiding getting drawn into the forthcoming war ...

**222. In our view there is only one conclusion that can be drawn from the above explanation: either Mr. Mohaddessin and the other senior officer of the PMOI who was authorised to give evidence on behalf of the PMOI in the First Appeal (Mr Abedini) were not telling the whole truth in their evidence before the Commission at that time or those speaking for the PMOI are not telling the**

truth before the Commission on this appeal. We would also note that, in our judgment, Mr. Mohaddessin's explanation of the reasons why in statements made between August 2002 and February 2003 (i.e. between a year and eighteen months after the June 2001 decision was made), it was not possible to make a public statement because of a need properly to inform people of the wisdom of the decision, of a fear of "undesirable and imprudent reactions" from some units, and that the process continued "into 2002", does not sit comfortably with Madame Hosseini's evidence that the decision was put into force across Iran in July 2001 and that, after 2001, the PMOI no longer had a military structure inside Iran.

223. Even if Mr. Mohaddessin's explanation of why he did not tell the truth on the previous occasion is correct, the Appellants will no doubt understand why (a) this Commission takes a very serious view of the fact that, for whatever reason, Mr. Mohaddessin and another senior official of the PMOI were prepared (deliberately) not to tell the truth to this Commission and (b) the Secretary of State would be entitled, whatever level of scrutiny is applied, to place little or no weight on evidence from such sources without such evidence being corroborated by other sources.
224. Obviously the mere fact that representatives of the PMOI have been untruthful in proceedings before this Commission does not lead to the conclusion that the PMOI "*is concerned in terrorism*" for the purposes of the Act but, as we said earlier, the PMOI have not helped themselves in achieving their desired aim of deproscription.

(d) The September 2003 Minutes and other documentary evidence of the alleged June 2001 Decision

225. As was set out in Mr. Barai's Witness Statement, some documentary evidence of the decision to demilitarise was produced. This was initially in the form of a document which is said to be the Minutes of the Annual Congress of the PMOI on the 6<sup>th</sup> September 2003 [**4B/2/3**] (i.e. a congress after the allied invasion of Iraq in the Spring of 2003 but before the signing of the individual

statements in July 2004 [**CB/131-133**] as recorded in the public statement of the NCRI in July 2004 [**3A/3/2**] and at a time when the PMOI bases and arms in Iraq were under the control of the Coalition Forces). It is a short document running to about two sides of A4 paper. Although its authenticity was not directly challenged by the Secretary of State, it was submitted that the Secretary of State and POAC were entitled to approach it with caution.

226. The first relevant passage appears under a heading “Report by the Secretary General” (who was recorded as being Ms. Parsai):

6. Ms. Parsai recalled and reaffirmed the decision by the PMOI Leadership Council in June 2001 concerning an end to military operations inside Iran, which was later confirmed by the PMOI’s extra-ordinary session. She also condemned the bombing of PMOI bases in Iraqi territory as well as the June 17, 2003 raid against the office of the [NCRI] in France and the pressures exerted on the supporters and sympathizers of the PMOI and the Iranian Resistance in Great Britain and the United States...under the pretext of the terrorist label. Emphasizing that the PMOI had rejected all forms of terrorism and violence, Ms. Parsai said that the campaign to remove this unjust label was the duty of all members and sympathizers of the Resistance.

227. No reference is made to the reaffirmation of the decision of the Leadership Council (of June 2001) and of the Extraordinary Congress by a further ordinary Congress of the PMOI in September 2001.

228. The following section headed “Decisions taken by the Congress” records:

1. In view of the developments in the past two years, especially the PMOI’s new status in Iraq, the Congress approved of the report by the Secretary General referred to above.

229. It should be noted that a different approach was taken in these Minutes to the reaffirmation of an earlier decision of the Leadership Council at paragraph 4 of the Decisions where it is specifically recorded that the Congress reaffirmed the decision taken by the Leadership Council on May 10, 2003, on the recommendation of Mr. Massoud Rajavi, to hand over voluntarily the organization’s weaponry to the Coalition Forces.

230. Towards the end of the open hearing, the Appellants produced another piece of documentary evidence under cover of the Second Witness Statement of Mr. Mohaddessin [8/10]. On its face, this appears to be a letter dated 30 August 2001 sent by Mr. Mohaddessin to Secretary of State Colin Powell challenging the intended re-designation of the PMOI by the USA as a terrorist organisation. In the letter Mr. Mohaddessin stated:

The PMOI's military operations before the organization decided to end them in June 2001 had never targeted civilians.

In addition, the Iranian Resistance's Leader Massoud Rajavi has repeatedly and strongly condemned terrorism in whatever form and under whatever pretext and has expressed opposition to the philosophy of violence and vengeance.

...

In view of the above and in order to ensure a fair hearing as well as to provide you with correct information, it is imperative that the counsel and representatives of the PMOI and the NCRI meet with the State Department's representatives and counsel to reply to all ambiguities and questions.

231. The Witness Statement was produced very late in these proceedings. It was then supplemented by a JPG picture which purported to show that modifications to the document were recorded on a computer in August 2001.

232. Counsel for the Respondent had, understandably, very little opportunity to take instructions in relation to the document. It was clearly not one that the Minister or Secretary of State had taken into account before the decision to refuse the application for deproscription, nor was it one that could properly be considered by Mr. Fender. On instructions that for entirely understandable reasons were hastily obtained, neither the UK Government nor, more importantly, the US State Department had any record of receiving the letter or a copy of the same. There was no evidence that there was any response to the letter.

233. We have already commented adversely on the reliability of Mr. Mohaddessin's evidence on any matter in the absence of independent corroboration of it. In our view the letter raises more questions than it answers even if it is genuine. It appears that counsel was instructed in the USA to challenge the intended re-designation of the PMOI as a terrorist organisation in August 2001 and it is inconceivable that relevant documents and information were not passed to

that counsel at that stage which would inevitably include documents evidencing the decisions alleged to have been taken in June and July 2001 (and copies of such documents are unlikely to have been destroyed in the bombing of PMOI bases in Iraq in 2003 or removed in raids on NCRI offices in 2003). We note that both the PMOI and the NCRI brought proceedings against both Colin Powell and the Department of State in the United States Court of Appeals for the District of Columbia, which were decided in May 2003 and July 2004 (see [2/16/5]), and again it is inconceivable that this letter and any documents evidencing the decisions alleged to have been taken between June and September 2001 would not have emerged in the course of those proceedings.

234. Further, we do not understand how the letter can be described by Mr. Mohaddessin as intended to be a private communication (or not intended to receive wider publicity) when it is clearly in open form and is dealing with a challenge to the re-designation of the PMOI and NCRI as terrorist organisations in the USA. Indeed, if the letter is genuine, it throws into even starker relief the untruthful evidence in the First Appeal and undermines the attempts to explain that away by Mr Barai and Mr. Mohaddessin in the present appeal.

235. For present purposes, in our view, both the Secretary of State and this Commission are entitled to give no weight to this letter.

236. The September 2003 Minute is a more compelling document. It:

“recalled and reaffirmed the decision by the PMOI Leadership Council in June 2001 concerning an end to military operations inside Iran”.

We note however that the Minute does not itself clearly and unequivocally state that the PMOI had permanently renounced violence (or all military action in Iran) in June 2001.

237. However, when taken with the change in policy evidenced by the other matters to which we have drawn attention, it is probable that some sort of

decision was taken by the PMOI in mid-2001 to halt military operations in Iran.

238. We strongly doubt, however, that either we or the Secretary of State (or indeed the Appellants) have been told the complete truth about the terms of that decision and, more particularly, the reasons for it. As such, on its own, the Secretary of State was entitled to regard the suggestion that the “decision” was a complete and permanent renunciation of all violence with some considerable scepticism.

(e) Conclusion

239. Despite our criticisms of the evidence from the PMOI witnesses, 2001 and 2002 was a period during which, on the material before us, the organisation’s policy towards military operations within Iran changed. The evidence is clear in certain respects. At about that time, the Secretary of State’s “highly reliable” assessment was that the PMOI probably did not have a military command structure inside Iran and that the operatives who had historically carried out attacks probably infiltrated Iran from PMOI bases in Iraq. Even in their tainted witness statements in the First Appeal, the PMOI witnesses themselves asserted that the military structure inside Iran had been dismantled by 2002 and, in this appeal Madame Hosseini asserts that this was complete by the end of 2001. This is considered further under the heading “The Military Command inside Iran” below. Further, there is no evidence of any attacks carried out by the PMOI either in Iran or against Iranian interests (unless one counts the May 2002 “claim” which was retracted). There is only limited evidence (three reports) of “support” in the widest sense for acts of others, only two of which were violent acts. Even that “support” ended by August 2002.

**(vi) 2003 and 2004: The Invasion of Iraq**

**(a) Introduction**

240. On any view, the years 2003 and 2004 were significant for the PMOI, given the invasion of Iraq by Coalition Forces. It is accepted by both the Appellants and the Respondent that the outcome of the occupation of Iraq by the Coalition Forces was that the PMOI in Iraq was effectively disarmed as a military force and, as a result, no longer has any military capability in Iraq. It is also clear that most of the PMOI membership in Iraq, including the leadership of the organisation based in Iraq, signed declarations renouncing violence and, according to the Appellants, were granted “Protected Person” status under the Fourth Geneva Convention by the Commander of the Coalition Forces in Iraq, thereby recognising that the PMOI and its members were not “enemy combatants” (i.e. they had not fought with the Iraqi army against the Coalition Forces and had not subsequently engaged in any military operations against the occupying force). There was a significant debate before us as to the conclusions to which a reasonable Secretary of State ought to have come in the light of that evidence.

**(b) The PMOI’s military capability in Iraq and the disarmament of the PMOI**

241. It is not in dispute that in 2003 the PMOI maintained a large military arsenal in Iraq. According to a US CENTCOM press release dated 17 May 2003 relied on by the Secretary of State [**Doc 71 at 3A/334**]:

*Coalition forces have consolidated 2,139 tanks, armored personnel carriers, artillery pieces, air defense artillery pieces and miscellaneous vehicles formerly in the possession of the [PMOI] forces. The 4<sup>th</sup> Infantry Division also reports they have destroyed most of the MEK munitions and caches. The voluntary, peaceful resolution of this process by the [PMOI] and the Coalition significantly contributes to the Coalition’s mission to establish a safe and secure environment for the people of Iraq.*

242. An AFP report dated 17 May 2003 [**3A/335**] also relied on by the Secretary of State, after quoting the CENTCOM press release, also stated as follows:

*The US-listed terrorist organisation began submitting heavy weapons and thousands of fighters to US control in Iraq last Sunday, a day after the deal was struck at a guerrilla base in northeastern Iraq.*

*Under the agreement, the [PMOI's] 4,000 to 5,000 fighters - many of whom were educated in the United States and Europe - were to gather at one of their base camps in northeastern Iraq and submit to US control.*

*Their equipment, enough for a mechanical division, was to be collected at another camp and both camps to be guarded by coalition forces.*

*US 4th Infantry Division commander General Ray Odierno said the deal was not a surrender but an agreement "to disarm and consolidate".*

- 243. Further, in a letter dated 30 April 2003 [4C/6/129] to Lord Clarke of Hampstead CBE KSG, the FCO Parliamentary Undersecretary of State, Mr. Mike O'Brien stated:**

*Our intelligence assessments of the MeK [PMOI] showed that the organisation was fully integrated within the Iraqi security forces and would be used by the Iraqis in the event of a coalition invasion of Iraq. I can confirm that some elements were attacked by coalition forces as part of the overall operational objective of downgrading Iraq security forces' ability to fight as part of the military campaign. Now that military offensive action is limited to putting down pockets of resistance, there should be no further attacks upon the MeK [PMOI] provided they do not threaten the security situation.*

- 244. This was reiterated by Mr. O'Brien in a letter dated 12 June 2003 [CB/119] to the Rt. Hon. David Anderson MP (who, we infer, had raised questions with the then Foreign Secretary, the Rt. Hon. Mr. Straw, following a meeting with the Iranian Ambassador), Mr. Mike O'Brien stated:**

*Thank you for your letter of 1 May to Jack Straw about your meeting with Ambassador Sarmadi on 30 April.*

*You specifically asked about coalition policy towards the [PMOI]. It is ludicrous for the Ambassador to claim that the [PMOI] are a tool of the coalition. As you will know, both we and the US regard the [PMOI] as a terrorist organisation: it is on the list of groups proscribed by the Home Secretary under the Terrorism Act 2000. Furthermore, our intelligence assessments of the [PMOI] showed that they had been fully integrated into Saddam Hussein's security apparatus. As such, during the conflict hostile [PMOI] operatives were targeted like other Iraqi forces. After the cessation of hostilities US forces were not able to take on such a complex organisation immediately. But I can confirm that on 8 May US forces surrounded the main body of [PMOI] forces and gave them an ultimatum. They are now systematically detaining and disarming them. We appreciated Iran's restraint in not intervening during the conflict. In turn the coalition has ensured that one of Iran's bitterest enemies is no longer a threat.*

*It may be that one or two US army commanders in theatre made ad hoc arrangements with factions of the [PMOI]. Added to this is [PMOI] propaganda about a secret deal between the US and [PMOI]. And the coalition has not yet decided how to treat the surrendering [PMOI] forces. Taken together, these may help to explain the Ambassador's comments, but his concerns are not warranted...*

245. That letter was supported by a Diplomatic Note from the Embassy of the USA in London dated 22 May 2003 [3A/382] to the FCO:

*The Embassy of the United States of America...has the honor to provide formal notification of the U.S. Government's policies towards the [PMOI].*

*The United States considers the [PMOI]...a foreign terrorist organization. [Details of its designation as such are then given.]...These designations remain effective, and will remain in effect until they expire or are revoked.*

*The Coalition has demanded the surrender of the [PMOI] and is in the process of obtaining the surrender of its members.*

*[PMOI] forces in Iraq have fallen under U.S. Control are [sic] being disarmed.*

*The policy of the USG is to eliminate the [PMOI's] ability and intent to engage in terrorist activity and to prevent its reconstitution as a terrorist organization.*

246. The Secretary of State also relied on a report of a meeting on 15 October 2003 (year not stated but appears to be before the signing of the individual statements in July 2004). In the course of that meeting, the representatives of the US Embassy are recorded as stating the following:

*Although the [PMOI] did serve as an arm of the former regime's security apparatus prior to Operation Iraqi Freedom, the CJTF-J and MNF-I concluded that there is no evidence that the [PMOI] acted as belligerents in the most recent Iraqi conflict.*

247. On the basis of the material before us, the only conclusion that can be drawn is that, as a matter of fact, although the PMOI forces in Iraq were extremely heavily armed before the invasion of Iraq in the Spring of 2003, those arms were handed over to the Coalition Forces in May 2003. There is no evidence relied on by the Respondent that the PMOI retained any military capability inside Iraq after that date. There is no evidence relied on by the Respondent that the PMOI has at any stage subsequently sought to obtain weapons of any type or undertaken any type of military operations, military training of personnel or recruitment of individuals for potential military operations.

(c) The Declarations and Protected Person Status

248. The Appellants relied on a number of agreements and declarations signed in Iraq following the invasion of Iraq by Coalition forces. The first was a “Local Cease-Fire Agreement of Mutual Understanding and Co-ordination” dated 15 April 2003 [CB/88] as amended on 19 April 2003 [CB/93]. Pursuant to that Agreement, the National Liberation Army and the PMOI, while declaring that they had not taken part in any military operations against the US/Coalition forces, agreed with the Coalition that they would each order and enforce a complete cessation of all hostilities against each other in Iraq and the NLA commanders agreed to ensure that military forces under their command were consolidated at, and would remain in certain specified bases. The Coalition forces acknowledged that the agreement was a local agreement and did not “*surrender or capitulate troops under command of the NLA Commander*”. Further, pursuant to Article 11 of the Agreement, the NLA reserved “*the right to self defense against the Iranian regime’s attacks*”.

249. In July 2004 (i.e. more than a year after the invasion) all members of the PMOI in Iraq, including the leadership of the organisation based there (but not Mr and Mrs Rajavi, and other members of the leadership, who appear to have left Iraq by that date), signed agreements which permitted them “*release from [the] control and protection*” of the Coalition forces in Iraq [CB/131-133]. In order to obtain that benefit, each individual had to sign a statement containing the following words:

*...I agree to the following:*

- a. *I reject participation in, or support for terrorism.*
- b. *I have delivered all military equipment and weapons under my control or responsibility.*
- c. *I reject violence and I will not unlawfully take up arms or engage in any hostile act. I will obey the laws of Iraq and relevant United Nations mandates while residing in this country.*

250. On the 2<sup>nd</sup> July 2004, the Commander of the Multi-National Forces in Iraq issued a “Proclamation” [CB/130] to the members of the PMOI living at Camp Ashraf in Iraq in the following terms:

*The United States has confirmed your status as “protected persons” under the Fourth Geneva Convention and has communicated that determination to the International Committee of the Red Cross in Geneva. The acknowledgement of this determination will assist in expediting the efforts of the International Committee of the Red Cross and the United Nations High Commissioner for Refugees in your disposition as individuals in accordance with the applicable international law.*

251. In his first Witness Statement **[1/D1/11 at Paragraph 51]**, Mr. Fender said that he understood that the US was treating individuals “*as if*” they were protected persons. On the basis of the material before us, it seems that all those individuals who signed the declarations have actually been accorded protected person status, consistent with the conclusion that they were not “enemy combatants” during the invasion (i.e. confirming that the PMOI did not fight against the Coalition forces). However, it is correct to note that not all members of the PMOI have signed the declarations. In particular, the members of the PMOI who had left Iraq in early 2003 or indeed who left before the commencement of US investigations at the end of 2003 have not signed such declarations. Mr Massoud Rajavi, who, as identified in the September 2003 Minutes, was a person upon whose recommendations the Leadership Council relied, has not signed such a declaration.
252. The Appellants placed considerable emphasis on these documents, submitting that it showed that there had been an unequivocal renunciation of terrorism and violence by the PMOI, including all of the leadership, and that they could not have been accorded “protected person” status if they had been engaged in acts of terrorism. Nevertheless, in our judgement there is considerable force in the submission of the Secretary of State that the declarations have to be viewed with some caution. As we have already indicated, it is clear from the evidence before us that the PMOI does not accept, and has never accepted, that its military operations against Iran amounted to “terrorism” or were anything other than a lawful struggle for self-determination. Viewed in that light, the declarations do not necessarily amount to a renunciation of carrying out or supporting violent attacks on *Iranian* targets.
253. Counsel for the Respondent submitted that the Secretary of State was entitled to conclude that these declarations and agreements were pragmatic

agreements by the PMOI members, making the best of the situation in which they found themselves. We will return to the latter submission below.

254. For present purposes, we agree that the individual agreements referred to above, and the granting of “protected person” status, do not, on their own, lead to the inevitable conclusion that the PMOI had renounced its past policy of carrying out or supporting violent attacks on Iranian targets. The evidence is consistent with the fact that the PMOI remained neutral during the invasion and subsequent occupation of Iraq by Coalition forces and was relevant material which the Secretary of State had to consider in the context of the other available material.

(d) Self defence, voluntary disarmament and the Alleged Agreement/Conspiracy pursuant to which PMOI bases were bombed.

255. There was extensive debate before us as to the reasons why the PMOI had maintained a substantial military capability in Iraq. In simple terms, the Appellants submitted that a reasonable decision maker could only have concluded that it was necessary in order for the PMOI to protect itself against attacks in Iraq by Iranian forces or agents of the Iranian regime. The Secretary of State maintained that the extent of the military arsenal was inconsistent with a purely defensive strategy.

256. Similarly, there was considerable debate as to the PMOI’s motives in handing over its weapons to the Coalition forces. The Appellants maintained that it could lead only to the conclusion that the PMOI was set on a peaceful course and that, once the alleged threat to its bases from Iranian forces had been removed (because Iran had not intervened in the Iraq war and, following the occupation of Iran, the PMOI bases were under the protection of the Coalition forces), they immediately handed over their weaponry and disarmed. The Respondent submitted that such actions were consistent with a pragmatic decision by the PMOI in the face of the overwhelming military superiority of the Coalition forces to surrender and to make as much political capital out of the situation as possible, rather than fight.

257. Finally, the Appellants advanced a case that the evidence before the Commission demonstrated that, pursuant to an agreement with Iran, a decision was taken by the UK and the USA to bomb PMOI bases in Iraq during the invasion in circumstances where the UK and USA forces had positive prior knowledge that the PMOI would not take part in the fighting and, in particular, would not fight with the Iraqi forces against the Coalition forces. In other words, the suggestion was that the UK and USA had deliberately bombed innocent non-combatants. Such an allegation is an exceptionally serious one to make. It was part of a wider submission advanced by the Appellants that, in order to ensure smooth diplomatic relations with Iran, the UK has either agreed with Iran or has chosen to keep the PMOI proscribed when the Secretary of State is aware that there are no lawful grounds for so doing.

258. We deal first with the Appellants' submissions summarised in the previous paragraph. We can do so shortly. Whatever standard of proof is applied, on the material before us, there is no material that supports the contentions of the Appellants and we have to record our surprise that the argument was advanced. As has been set out in the letter dated 12 June 2003 from Mr. O'Brien to Mr. Anderson and the report of the meeting between FCO and US Embassy officials on 15 October 2003, prior to the invasion, the Coalition forces assessed that the PMOI military capability was fully assimilated into the security apparatus of the Saddam Hussein regime.

259. Counsel for the Appellants relied on paragraphs 35 and 36 of Mr. Fender's Second Witness Statement **[1/D2/29]**:

35. *Lord Archer asserts in his witness statement that 'unprovoked bombing of PMOI bases by the UK and US' during hostilities in Iraq in 2003 was 'part of a deal with the Iranian regime'.*

36. *During the autumn of 2002 and the spring of 2003, the Iranians were keen to understand Coalition views on Iraq and possible military action, including how that might affect the PMOI. They expressed concern about the possibility of PMOI attacks on Iran during any military campaign. UK officials reassured their Iranian counterparts that we would take the problem of the PMOI in Iraq seriously.*

260. He submitted that this is “political speak for ‘yes, there was a deal with Iran to bomb’ the PMOI, in other words there were “unprovoked” bombings of the PMOI”. We disagree. The passage in Mr. Fender’s statement makes it clear that the concerns of the Iranian regime were that the PMOI would attack Iran if the Coalition attacked Iraq (i.e. in an endeavour to draw Iran into any conflict) and UK officials were assuring the Iranians that they were alive to this possibility and were taking it seriously. In our view that is absolutely consistent with the assessment of the UK and US that we have previously referred to, namely that the PMOI were assimilated into the Iraqi security forces and had a large military force which was capable of being used against Iran. The fact that subsequently the PMOI did not support the Iraqi forces and took no part in the fighting against the Coalition forces does not affect the reasonableness of the assessments made prior to the invasion.
261. Lord Archer’s assertion that there had been such a deal to which Mr. Fender referred was set out in paragraph 13 of his first Witness Statement **[1/C7/89 at page 92]**. It was based on the first two paragraphs of an article in the Wall Street Journal on 17 April 2003 (i.e. in the early stages of the invasion) **[4C/7]**:

*In a move to persuade Iran not to meddle in Iraq, U.S. forces have bombed the camps of Iranian opposition fighters on the Iraqi side of the border and have reached a surrender agreement with the group’s remaining fighters, U.S. officials said.*

*The dismantling of the Iranian opposition force in Iraq, known as the Mujahedin-e-Khalq, or MEK, [i.e. the PMOI] fulfils a private U.S. assurance conveyed to Iranian officials before the start of hostilities that the group would be targeted by British and American forces if Iran stayed out of the fight, according to U.S. officials. The effort was part of a broader strategy aimed at reassuring Tehran that the war in neighbouring Iraq held out the prospect of benefits, the officials said.*

The article also went on to say:

*Eliminating the MEK’s Iraqi base of operations, from which the group has mounted hit-and-run operations along the border and violent terrorist attacks in Tehran for decades, has long been a major Iranian goal.*

*The U.S. has designated the MEK as a terrorist organization, which is another reason for disarming it, officials said. By carrying out the strikes, Washington and London are trying to keep Iran neutral or at least not actively opposed to broader U.S. aims in Iraq.*

*Although Tehran denounced the invasion and even lobbed artillery and rocket shells into Iraq in recent weeks, bombing the MEK camps has removed one justification for Iranian forces to mount incursions into Iraq...*

*Worried about appearing to attack the MEK on Tehran's behalf, U.S. military commanders have justified the bombing of MEK camps as necessary for protecting U.S. troops. In an interview last week, Vice Adm. Timothy Keating said that KEK units were targeted because the U.S. had reason to think that they might fight on Baghdad's behalf. Air Force Gen. Richard Meyers, chairman of the Joint Chiefs, confirmed Tuesday that the U.S. had bombed the MEK and said "some of them may surrender very soon."*

262. A further article relied on by the Appellants appeared in the Washington Post on the following day (i.e. 18 April 2003) [CB/96]:

*Bush administration officials said yesterday they are pleased by Iran's willingness to cooperate with U.S. requests during the war with neighbouring Iraq - a decision perhaps smoothed by the administration's bombing of Iranian opposition fighters based in Iraq...*

...

*Two senior U.S. officials - Zalmay Khalilzad from the White House and Ryan C. Crocker from the State Department - met secretly in January with Iranian officials to discuss potential cooperation. The U.S. officials asked that Iran seal its border to prevent the escape of Iraqi officials, among other requests, and suggested that the United States would target the Iraq-based camps of the [PMOI], a U.S. official said.*

*"We told them they would find it advantageous" if the United States struck the [PMOI] camps, the official said. A more concrete commitment to attack the camps was later relayed to Tehran through British officials. The [PMOI], who have been a source of information on Iran's nuclear programs, have protested angrily about the attacks, saying they were unprovoked.*

263. In our view newspaper articles, giving journalists' summaries attributed to unidentified officials, do not come close to establishing grounds for asserting that there was a conspiracy involving the officials at the highest level of the political and military structures in the US and UK to bomb the PMOI for unlawful reasons.

264. We reiterate that the material before us leads to the conclusion that, before the invasion, the Coalition forces assessed that the PMOI forces were assimilated into the Iraqi forces and would actively fight against the invading forces. Given that the very *raison d'être* of the PMOI was to oppose the Iranian regime, and the obvious advantages to the Iraqi regime if Iran could be drawn into any conflict, it was also a reasonable assessment that the PMOI forces might be deployed to that end. We should add that, in any event, a careful reading of the articles set out above shows that they are not inconsistent with the assessment by Coalition Forces recorded above. If the

PMOI was assessed as being part of the Iraqi military structure and might be deployed against Iran in the event of an invasion, there was every reason for the Coalition forces to target them and to assure the Iranians that they would do so in order to protect Coalition forces, assist in the success of the invasion and keep Iran out of the conflict. That is also consistent with Mr. Fender's evidence.

265. In paragraph 39 of his first Witness Statement **[1/C6/72 at page 86]** Lord Alton of Liverpool stated that "*The truth was that...prior to the war, the PMOI had made clear to the US, Britain and the UN that it was independent of the Iraqi regime and, as it had done in the first Gulf war, would play no part in any conflict between the Coalition and the Iraqi regime*". In support of that contention, Lord Alton stated that, in November 2002 and January 2003, the PMOI provided the co-ordinates of their camps to the United Nations Monitoring Verification and Inspection Commission in Baghdad (i.e. the organisation more colloquially known as the Weapons Inspectors) who, he stated, in turn conveyed the information to New York. During the course of the hearing before us, another of the Appellants, Lord Corbett of Castle Vale provided us with his second Witness Statement **[1/C1/28A]** in which he explained:

*At the end of February/beginning of March 2003, I made contact with officials in the Ministry of Defence concerning the war and the impact it would have on the PMOI. I provided MOD officials with a copy of documents containing the coordinates of the PMOI's 11 bases, which had been provided to be by NCRI's UK representative.*

The list of coordinates referred to by Lord Corbett (which he exhibited to his statement) is a copy of the list that had been provided to the UNMOVIC inspectors. In the endorsed copy of his letter subsequently produced by the Respondent after enquiry, the attachment simply gives the locations of the camps without the precise co-ordinates.

266. In the Application for deproscription, the Appellants also referred (at paragraph 34 **[2]** and **[1/B1/10]**) to a message issued on 11 February 2003 by the NCRI President, Mr Massoud Rajavi, "*in which he confirmed that the PMOI had not been and was not involved in Iraq's internal affairs and its*

*only objective in being present in Iraq was to pursue its struggle against the clerical regime in Iran*", again in support of the contention that the PMOI had always pursued a "*policy of independence and non-interference in Iraqi internal affairs*".

267. This material is relied upon to support the contention that the Coalition forces knew that the PMOI would not fight against the invading forces and the broader allegation of the conspiracy between (presumably) numerous high ranking officials of different governments to bomb them.
268. Again, a careful review of the material shows that there is no support for the suggestion that the PMOI "*had made clear to the US, Britain and the UN that it was independent of the Iraqi regime and, as it had done in the first Gulf war, would play no part in any conflict between the Coalition and the Iraqi regime*".
269. At most it shows that the PMOI cooperated with UNMOVIC and that Lord Corbett provided the MOD with the same coordinates as had been provided to UNMOVIC, coupled with a statement by Mr. Rajavi that the organisation's aim was to pursue the struggle against the Iranian government. Further, the Respondent produced letters to the Foreign Secretary from Lord Clarke of Hampstead and Lord Alton of Liverpool dated 20 March and 19 March 2003 respectively in which, particularly in the case of the former, they asserted that the PMOI was neutral in the struggle between the Coalition forces and the former Iraqi regime. They were expressions of opinion by two Parliamentarians. They were not formal communications from the PMOI itself.
270. On the material before us, it appears that there is no support for the submission that the PMOI formally communicated that it would not take up arms against the Coalition forces. Even if it had, it remained for the Coalition forces to make their own assessment of the PMOI's military capability and as to whether they posed a threat to the Coalition forces. That assessment is

recorded in the open material set out above. It was an entirely reasonable one.

271. We should add that, on proper analysis, the Appellants did not need to make good the allegation that there was a conspiracy to bomb PMOI bases in order to succeed in the present appeal. We have only dealt with it because it was vigorously advanced before us and, after a careful review of the material, we wished to make it clear that there were no grounds to support this serious allegation.
272. Turning to the other submissions advanced by the Appellants, we accept that there is clear support for the assertion that the PMOI bases were attacked by Iranian forces repeatedly over a large number of years. That is, perhaps, hardly surprising given that the PMOI maintained a large, heavily armed force on the borders of Iran which the Iranians are likely to have perceived to have the object of overthrowing the Iranian government. This was supported by the Iraqi regime which itself was a bitter opponent of Iran. We accept that the open material demonstrates that the National Liberation Army was not deployed in offensive operations inside Iran after 1988. We can see that, from the perspective of the PMOI, they may well have felt it necessary to maintain the ability to defend themselves against Iranian forces if they were attacked and in that sense, the force was maintained for “self-defence”. Conversely, since the PMOI never declared a cease fire or stated publicly that it intended to cease military operations against Iran (as we have set out above), we can also readily understand why the Iranian authorities may well have viewed the presence of a heavily armed military division on their border as an aggressive force.
273. Equally, in our view the Secretary of State could reasonably conclude that the maintenance of such a large, well-armed force was not consistent with it being entirely for protection against unprovoked aggression by Iran.
274. Similarly, we accept that it is possible, on the evidence, reasonably to conclude that the PMOI adopted a pragmatic attitude to the invasion of Iraq by the

Coalition forces, given the overwhelming superiority of the Coalition forces, if that evidence is viewed in isolation.

275. Nonetheless, this misses the point. The evidence before us is that:

275.1. The PMOI disarmed in May 2003, whether voluntarily or as a pragmatic step;

275.2. That disarmament removed the PMOI's military capability in Iraq;

275.3. There is no material on which the Respondent relies to suggest that the PMOI has sought to re-establish *any* military capability however small. Similarly, there is no evidence that the PMOI has sought to acquire weapons, undertake military training for its personnel or recruit new military personnel at any time since May 2003 whether in Iraq or elsewhere. Indeed, what is noteworthy is that, in a case where there is clearly a significant amount of propaganda issued by the Iranian government (as well as the PMOI), there is not even the suggestion from the Iranian government in the open material that the PMOI have taken any steps to re-establish itself as a military force.

276. The material before us points only to one conclusion. The PMOI has not had any military capability in Iraq since May 2003 and has not sought to re-establish any military capability in the intervening years.

(e) The alleged agreement with Iran to keep the PMOI proscribed

277. The Appellants also asserted that, during diplomatic discussions between representatives of the European Community (including UK representatives) and Iran in relation to Iran's nuclear programme, an agreement was reached pursuant to which, in return for Iran agreeing to suspend its enrichment related and reprocessing activities, the EU (and the UK in particular) agreed to maintain the proscription of the PMOI. It was submitted that the current proscription is being maintained in order to placate Iran and is or would be

maintained even if the Secretary of State knew that there were no proper grounds for continuing to proscribe the PMOI. According to the Appellants this improperly affected (and infected) not only the Second Stage (the question of the exercise of the discretion) but also the First Stage of the decision making process. The Secretary of State concedes that, if this occurred, the decision would be flawed and must be quashed.

278. The Appellants rely on, amongst other things, a clause at the end of a written agreement between the E3/EU representatives and Iran dated 15 November 2004 [**CB/144**] which provides as follows:

*Irrespective of progress on the nuclear issue, the E3/EU and Iran confirm their determination to combat terrorism, including the activities of Al Qa'ida and other terrorist groups such as the [PMOI]. They also confirm their continued support for the political process in Iraq aimed at establishing a constitutionally elected Government.*

279. Mr. Fender dealt with this allegation at some length in his Amended Second Witness Statement [**1/D2/27**]. We do not set the relevant passages out in full. Mr. Fender's conclusions at paragraphs 32 and 43 include the following:

32. *...I do not believe there was ever any intention that any discussions with Iran about terrorism should have should have a bearing on the PMOI's proscription: the Government was then (as now) of the view that the PMOI was rightly and properly proscribed in the UK under the Terrorism Act 2000 and likely to remain so.*

...

43. *For the reasons addressed above Lord Archer was incorrect to assert in his statement of 2 May that 'the PMOI was proscribed, not out of concern for terrorism, but as part of an agreement between the British government and the Iranian regime in which the PMOI was used as a bargaining chip' nor is this claim supported by the material in his statement. The Appellants' application for deproscription was refused for the reasons set out in Tony McNulty's letter of 1 September.*

280. In our view there is no credible support for the assertion that there was an agreement reached with Iran pursuant to which the PMOI would remain proscribed, still less that it would remain proscribed even if the statutory criteria for proscription were not fulfilled. Notwithstanding the terms of our determination in relation to the reasons for and legality of the decision to refuse the Appellants application for deproscription, we are satisfied that there was no improper motive on the part of the decision maker. Importantly

there is no material which would suggest that these considerations were ever drawn to the attention of the Secretary of State.

(f) Conclusion

281. In conclusion the material before us discloses that:

281.1. The PMOI did not oppose the Coalition forces during the invasion and subsequent occupation of Iraq and has remained, in effect, neutral;

281.2. Although, through the NLA, the PMOI did have a very substantial military capability in Iraq prior to 2003, it was disarmed in the immediate aftermath of the invasion;

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

281.4. Other material - and in particular the individual declarations made by the PMOI leadership and members in July 2004, the reasons for the PMOI's decision not to fight against the Coalition forces and/or to disarm - are open to alternative interpretations by a reasonable decision maker if looked at in isolation. For the reasons that we set out below, however, we do not believe that this affects the outcome in this particular appeal.

**(vii) The Military Command Inside Iran**

282. In about March 2001 a detailed FCO telegram to the British Embassy in Tehran [6/176] (redacted in part, but the open sections set out the history of the PMOI) [3A/84 document 8] made the following assessment at paragraph 13:

*The Iranian government continues to regard the [PMOI] as a serious security threat, although it is unpopular and has limited military and subversive capability. The scale and mode of [PMOI] operations suggests that its claim to have a military command inside Iran is probably untrue, but it must have well-equipped and well-managed cells in larger cities to support operatives who infiltrate from Iraq to carry out attacks, and spread [PMOI] literature, recruit sympathisers and gather information on regime activities (Katzman). The [PMOI] has never had sufficient strength or support to threaten the regime.*

283. It is to be noted that this assessment by the FCO was made at a time when the PMOI and its “military command” within Iran were claiming publicly that the latter was engaged in a substantial number of military activities within Iran. This demonstrates the important distinction between the claims made by or on behalf of an organisation and an informed assessment of the validity of such claims. This assessment is the only formal assessment by the relevant Government department of the PMOI’s military structure inside Iran in the material disclosed by the Secretary of State. There is no indication in the material that the assessment that the PMOI probably did not have a military command structure inside Iran, despite its claims to the contrary, ever changed thereafter. The position is therefore that the assessment of the FCO from early 2001 was that military operations inside Iran claimed by the PMOI were probably conducted by operatives crossing into Iran from the PMOI bases in Iraq to carry out attacks, before returning to Iraq. Clearly, if that is correct, the disarmament of the PMOI in Iraq would also have had the effect that there was no longer any substantial capability in the PMOI to conduct violent attacks inside Iran.

284. In contrast, the evidence filed by the Appellants was to the effect that the PMOI did have a military command structure inside Iran at some later date. Although we have set out in full the passages from the Witness Statements in the present Appeal and in support of the First Appeal which relate to this issue

at paragraphs 213 to 231 above, for convenience and ease of reading, we have repeated the relevant extracts below. In the Witness Statement of Mehdi Barai, a senior official of the PMOI resident in Ashraf City, Iraq, Mr. Barai seeks to explain why if, as the Appellants contended, there had been a decision in June 2001 to end military activities, there were attacks carried out on Iranian targets in July and August 2001. Mr. Barai stated [1/C2/30], amongst other things:

5. *Subsequently, in July 2001, the PMOI Leadership Council implemented the decision by communicating an instruction to all the operational units of the PMOI in Iran and all other PMOI members. They complied with this instruction when it was communicated to them, although difficulties of communication meant that it took a few months before all members could be informed. From then on, all PMOI members and activists inside Iran concentrated on expanding the network of supporters and stepping up political and social activities. This network of supporters is responsible for hundreds of anti-regime protests and strikes each month, as well as the gathering of information concerning the regime's human rights abuses, its acts of state terrorism and particularly its nuclear projects.*

...

11. *Although the decision to end military activity was put into effect across Iran in July 2001, I have explained that communication difficulties meant that a number of members did not receive the message for a few months. For this reason, a number of military operations were carried out in the few months following the decision. Consistent with its transparent policy, the PMOI accepted responsibility for those operations in a series of statements issued at the time. Since then, the PMOI has not conducted any military operations inside Iran nor has it retained any military structure or any weapons inside Iran.*

285. Madame. Hosseini's Witness Statement [1/C3/41] was to the same effect. In paragraph 5 of that witness statement, she stated:

*...After 2001, the PMOI no longer had a military structure inside Iran and was not involved in any military action, training, planning, intelligence gathering, retention or acquisition of arms, or encouraging or exhorting acts of violence by its membership.*

286. Mr. Mohaddessin's second Witness Statement [1/C4/46] is similar, albeit he suggests that the process continued into 2002, possibly as late as the summer of 2002:

5. *...Therefore, following the June 2001 decision, members of active units had to be reintegrated into society, with all that would entail, including jobs, homes etc. This all had to be done through the PMOI's support network to avoid those individuals being identified in the process, and involved a transition back from an underground to an open existence.*

...

8. *Another important consideration was the need to ensure that all members (including those imprisoned), particularly those who had up to that point been involved in*

*military operations or assisted those operational units, were fully informed of and convinced about the reasons and wisdom of the decision made by the organisation's leadership...From a logistical and practical standpoint, and in the light of difficulties in communication and correspondence, the process of informing and convincing was by necessity a time-consuming and burdensome task given that contact had to be made with networks which were scattered across. [sic] The PMOI needed to convince these people that this was the right course of action, one which many members and sympathisers, and even some senior officials, at first found very difficult to comprehend or digest.*

...

10. *...The PMOI wanted to make sure that its decision was well understood by all military units and those who provided support to them, and that these people did not only agree then to end military activity, but would continue to abide by that decision. The matter had to be explained to the extent that was possible, and military units and individuals in Iran had to be given assurances that their safety and security would not be jeopardised. Therefore, the decision had to be implemented gradually and in a measured fashion...*

.

11. *As a result of this careful implementation, military units have since the summer of 2001 been efficiently dissolved without incident...*

...

13. *The process of informing and convincing members and supporters continued into 2002. By the summer of 2002, the threat of military intervention in the region had become a matter of pressing concern:...*

287. The material before us indicates that the PMOI has not conducted any military operations *inside Iran* since probably August 2001 and at the latest May 2002. There is no evidence to suggest that it has now or has had since at the latest May 2002 a military structure or weapons inside Iran even if (contrary to the FCO assessment in March 2001) the PMOI possessed such a military structure prior to 2001 or 2002. Further, although there are examples of press releases issued by the PMOI in which the statement is claimed to emanate from, for example, "*the Mojahedin command inside Iran*" [3A/324], "*the MKO Command Headquarter [sic] inside the country*" [3A/329] and "*Command Headquarters of the People's Mujahedin of Iran, Tehran*" [3A/414], the latest date of any such communication relied on by the Secretary of State is 22 August 2002.

288. Counsel for the Respondent drew our attention to certain passages in the evidence submitted by the PMOI in the First Appeal.

289. In Mr. Mohaddessin's first Witness Statement dated 21 August 2002 in the First Appeal, he stated:

107. *The NLA [National Liberation Army] has transformed itself from an infantry force into an efficient, experienced, fully armoured and powerful army that poses the greatest single threat to the religious fundamentalist dictatorship in Iran...*
- ...
111. *Since 1988, the NLA has only been engaged in fighting with the Iranian regime's military units when the latter have attacked the NLA on Iraqi territory. All these engagements were initiated by the Iranian regime's armed forces and the NLA, in each case, has acted in self-defence. Military operations by the PMOI's operational units in Iran have nothing to do with the NLA. They are planned and carried out by the PMOI's Command inside Iran.*
- ...
113. *...The PMOI is engaged in a war of liberation, which as I have explained above, was imposed on it when all other avenues of peaceful activities were blocked off by the regime. The PMOI's military activities must be seen in the context of a war of liberation...*

**290. In Mr. Mohaddessin's second Witness Statement in the First Appeal dated 13 November 2002, he stated:**

12. *The PMOI's position has consistently been, since it was forced to take up arms, that it would cease all its operations if truly free and fair elections were held under international supervision in Iran...*
13. *The PMOI attacks only military targets, or institutions or persons which are directly responsible for committing crimes against humanity. The PMOI does not attack civilians or civilian institutions. The PMOI plans its operations very carefully so that no civilians are placed in any danger as a result of its operations...*

**291. To similar effect is paragraph 6 of the witness statement of Mr. Hossein Abedini dated 20 February 2003 in the First Appeal:**

6. *...the PMOI has consistently refrained from taking any action that would harm civilians, whether directly or indirectly, and in its use of the armed struggle, to which it was driven as a last resort, and which forms only a part of its activities, the PMOI adheres to, for instance, international definitions of what is a "military target"...*

**292. As we have set out above, however, the NLA was completely disarmed some months after the statements of Mr. Mohaddessin were prepared. Further, although it is correct that Mr. Mohaddessin used the present tense when referring to operational units inside Iran and being engaged in a "war of liberation", this reference to the command structure coincides with the latest reference in the press releases relied on by the Secretary of State, namely August 2002. Although it is correct that Mr. Abedini also used the present tense thereby conveying the impression that the "armed struggle" was then continuing, he did not refer to a command structure inside Iran or identify what actions were being taken pursuant to that "armed struggle". To the**

extent that he was referring to the NLA, the evidence is clear that it was disarmed very shortly after Mr. Abedini's witness statement was prepared; to the extent that he was referring to attacks inside Iran, the evidence is equally clear that the last such attack was probably in August 2001 and, at the latest, was in May 2002.

293. The Appellants also relied on publications by the PMOI. One example, is the "*Lion & Sun - The Iranian Resistance Magazine*" dated July 2005 [2/25/7]. This included a statement from Mrs Maryam Rajavi to 150 Members of the European Parliament in which she is reported as saying:

*By forming a pluralistic alternative, a widespread social network and a liberation army, the resistance has sufficient power and potential to bring about change in Iran. It has led to the Iranian people's movement for democracy in the most difficult domestic and regional circumstances.*

...

*The resistance movement has deep [sic] roots in society. As the core of this resistance the [PMOI] has been fighting for freedom against the dictatorships of the Shah and Khomeini for 40 years. The PMOI's extensive network across Iran organizes and gives direction to social protests, provides the movement with financial assistance and intelligence and reveals Tehran's most clandestine nuclear, missile and terrorist projects.*

294. Although we note the use in these publications of the descriptions of the PMOI as "resistance" and to the reference to establishing a "liberation army", as we have already set out above, the evidence before us indicates that the PMOI no longer had an army or military capability in Iraq, and the references by Mrs Rajavi to the network in Iran is referring to a network that is involved in protest but is not involved in military-type operations or violent attacks. Consistent with the FCO's assessment in March 2001, she refers to a network in Iran that is for social protests and intelligence gathering. The high point of the Respondent's submissions on this issue was to point to an Advertisement in 'The House' magazine (i.e. a magazine published for members of the Houses of Parliament) of the 31 March 2003 [2/6], recording a statement by Mr. Rajavi made on 11 February 2003 (i.e. shortly before the invasion of Iraq) in which he is recorded as saying, amongst other things:

*24 years after the anti-monarchic revolution the Iranian society is in an explosive state and a revolutionary stage. The storm is on the way. People from all walks of life protest against the mullahs at every opportunity and demand the overthrow of the clerical regime in its entirety.*

...

*Our war from the first day until the very end has been, is, and will be with the inhuman mullahs' regime and no one else...*

...

*The destiny of the Iranian Resistance would be methodically and directly connected to that of the Iranian regime and people of Iran...If the Mojahedin and Iran's combatants of freedom are prepared, as always, to offer their lives for the cause of Iran's freedom, the mullahs are seriously on the verge of losing power.*

When analysed, however, this does not amount to an assertion that the PMOI is maintaining a military capability in Iran, still less does it provide evidence that the PMOI was continuing to organise violent attacks on Iranian targets at that stage.

295. In our view, on all the relevant material a reasonable decision maker could only come to the conclusion that either there never was (contrary to the earlier claims of the PMOI) any military command structure or network inside Iran after 2001 or that, by some time in 2002, any such structure or network had been dismantled. There is no evidence of any present operational military structure inside Iran which is used to plan, execute or support violent attacks on Iranian targets. Nor is there any evidence that the PMOI has retained military operatives inside Iran with the intention of carrying out such attacks. That is consistent with the evidence that the PMOI has not carried out any attacks since August 2001, or May 2002 at the latest, and the absence of any evidence suggesting that the PMOI have attempted (whether in Iraq or Iran or, indeed elsewhere) to acquire weapons or a military capability following its disarmament in Iraq in 2003.
296. On the basis of the material before us, to the extent that the PMOI has retained networks and supporters inside Iran, since, at the latest, 2002, they have been directed to social protest, finance and intelligence gathering activities which would not fall within the definition of "terrorism" for the purposes of the 2000 Act.

**(viii) The Absence of a “Clear, Voluntary Renunciation” of Involvement in Terrorism**

**(a) Introduction**

297. The Secretary of State, both in his Decision Letter, and in the submissions advanced before us, placed considerable emphasis on what he regarded as the minimum requirements before he could be persuaded that the PMOI was no longer “concerned in terrorism” for the purposes of the 2000 Act. This is succinctly summarised on paragraph 9 of the Decision Letter:

*By its own admissions, the PMOI/MeK had been committing extensive acts of terrorism as recently as June 2001. If I am to be persuaded that such an organisation is no longer “concerned in terrorism” for the purposes of section 3(5) of the 2000 Act, I would expect (at least) a clear, voluntary, renunciation by its leadership of the organisation’s involvement in terrorism, together with a voluntary abandonment of its arms by its members. Neither the account of events in the document in support of the application nor the information otherwise available to me indicates that this has happened.*

298. This was repeated in the conclusions set out in paragraph 23 of the Decision Letter:

*I am not in a position to assess whether any cessation of terrorist acts in Iran was in response to the alleged decisions of the extraordinary Congress or dictated by other reasons. Mere cessation of terrorist acts do not amount to a renunciation of terrorism. Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future.*

299. We will return to the latter passage in the Decision Letter in due course. At this stage we simply note in passing that the requirement (if lawful) laid down in paragraph 9 of the Decision Letter would appear to erect two insuperable barriers to a successful application.

300. Thus, for example, as we have set out above, the PMOI has now been disarmed by the action of the Coalition forces in Iraq but the Secretary of State contends that the agreement of the PMOI to disarm was a pragmatic decision in the face of the overwhelming superiority of the Coalition forces rather than a voluntary act of an organisation that had genuinely changed its policy to pursue a peaceful campaign. As such, the PMOI can never, on the Secretary of State’s case, voluntarily abandon its arms precisely because there are no arms

left for it to be “abandoned”. On the Secretary of State’s case all such arms have been removed under the involuntary disarmament in 2003. As such, presumably, the organisation is forever tarred with the brush of its perceived failure to disarm voluntarily at some point prior to 2003.

301. Similarly, the requirement for a “clear and voluntary” renunciation by the leadership of the organisation’s involvement in terrorism (at least in the context of the unequivocal statements before us to the effect that the PMOI has formally renounced violence) is met with the submission that this is, once again, a pragmatic step designed to secure a short-term aim (i.e. deproscription) and/or that statements by the leadership of the PMOI are not reliable because of the untruths and inconsistencies in the evidence previously filed before this Commission. Although, we have considerable sympathy with the latter submission, if that was a lawful requirement, it would mean that the PMOI could remain proscribed simply because the leaders or some members of the organisation had not been entirely candid in all their dealings with the Secretary of State or this Commission.
302. We do not believe that this approach accords with the intention of Parliament when passing the 2000 Act. While the absence of a clear and unequivocal public statement by the leadership of the PMOI that the organisation has ceased all military operations and violent attacks against Iranian targets, no longer maintains any weapons and would not resort to or condone violent attacks in the future has undoubtedly not assisted the PMOI or the Appellants in their endeavours to have the proscription of the PMOI lifted, the absence of such a public statement, is, at best, only one factor to be considered in the light of all of the material in determining whether the statutory requirements have been met. If, as we believe, the material leads to the conclusion that the statutory criteria for proscription set out in section 3(5) of the Act are no longer met, the absence of such a statement cannot lead to the conclusion that the organisation remains “concerned in terrorism” for the purposes of the Act.
303. With those introductory observations, we now turn to examine the relevant evidence and the contentions of the parties.

(b) Statements consistent with a continuing intention to carry out attacks on Iranian targets

304. Counsel for the Respondent relied on various statements by senior officials of the PMOI in support of the submission that they are consistent with a continuing intention to carry out attacks on Iranian targets as and when circumstances permit. These fall into two broad categories. The first are documents where there is express reference to the continuing existence of a military capability inside Iran. The evidence of, for example, Mr. Mohaddessin in the First Appeal referred to above is the clearest example of this. We have considered this category of documents at Paragraphs 293 to 307 above. The second category, are documents where, on Counsel for the Respondent's submission, the relevant representative of the PMOI has failed to refer to the existence of the decision permanently to cease all military or other violent attacks in circumstances where one would expect to find it recorded or where the statement is consistent with a continuing intention to carry out attacks if circumstances permit and/or it is perceived to be in the interests of the PMOI. There are a limited number of documents falling into the second category.
305. Documents relied on as falling within the second category include Mr. Rajavi's statement in the advertisement in 'The House' magazine in February 2003 and Mrs Rajavi's statement reported in the "Lion & Sun" magazine of July 2005 to which we have already referred. Counsel for the Respondent pointed to other occasions when speeches of senior officials of the PMOI are reported in which there is no reference to the alleged decision to cease military operations. These include a "Symposium of Parliamentarians & Jurists" in March 2005 addressed by Mrs Rajavi at which she made no reference to that decision and a further "Symposium of Parliamentarians & Jurists" in November 2005 at which Mrs Rajavi condemned terrorism but defined it as "*any violent act that is directed at civilians*" (by which definition, on the PMOI's approach, they would not have been committing terrorist acts because they were not directed at civilians). It is, however, correct to note that the

introduction to the 2005 Declaration contains something entitled “The London Declaration” which states, amongst other things:

*The PMOI unilaterally ceased all military activities in the summer of 2001 and, in May 2003, it turned over all its weapons to Coalition forces in Iraq on the basis of a ‘Voluntary Consolidation of Arms’ Agreement”)*

which, at the very least, shows that the Symposium was proceeding on the basis that the PMOI had unilaterally ceased all military activities and voluntarily disarmed. As such, it is perhaps unsurprising that Mrs Rajavi did not reiterate the point in her address to the Symposium.

306. We do not believe that the documents relied on by Counsel for the Respondent advance his case beyond saying that there were occasions on which senior PMOI officials could have made a statement in the general terms that the Secretary of State required in paragraph 11 of the Decision Letter (and had previously required in June 2003 in the Decision Letter on the Second Application [5/A10/59]), but did not do so.

**(ix) The Rajavi “Interview”**

307. The Decision Letter of the 1<sup>st</sup> September 2006 [1/B3/39] addressed the evidence in support of the assertion made by the Appellants that the alleged policy to put an end to military activities in Iran (i.e. to all military activities) agreed in June 2001 had been stated publicly (paras 11 to 13). No reference was made to any statements made by Mrs Rajavi.
308. The Submission to the Secretary of State of the 25<sup>th</sup> August 2006 [1/D2/84] made no reference to any statements made by Mrs Rajavi.
309. The Secretary of State’s Open Statement of the Grounds for opposing the appeal [1/B 7/65] made no reference to any statements made by Mrs Rajavi.

310. However, the first statement of Mr Fender [1/D1/2 4<sup>th</sup> April 2007] served by the Secretary of State as providing the facts and reasons for the decision makes the following assertions:

310.1. that the witness statement represents the “F&CO assessment” as well as Mr Fender’s view (para 3).

310.2. that the Rajavi’s views on the use of violence against the Iranian regime remain ambiguous. For example, Maryam Rajavi declined to rule out armed intervention when she was interviewed by the Los Angeles Times on 1 February 2006 (para 41).

311. Following the service of this evidence, on the 2<sup>nd</sup> May 2007, the Secretary of State responded to a request to give particulars, as at the date of the Secretary of State’s decision, by reference to section 3(5) of the Terrorism Act 2000, the paragraph(s) of that sub-section on which the Secretary of State relies to reach his conclusion that the PMOI was, at that date “concerned in terrorism”, and all facts and matters relied upon in support of that conclusion.

312. The Secretary of State’s response is set out at [1/B8/81]. It states that:

*“In summary, the Secretary of State’s belief that the PMOI is an organisation concerned in terrorism rested on the following matters....As recently as February 2006 the main spokesman of the PMOI (Maryam Rajavi) declined to rule out violent action in support of the PMOI’s aims of removing and replacing the present Iranian government (see witness statement at paragraph 39).*

*Based on the matters thus summarised, the Secretary of State was entitled to conclude in accordance with the provisions of section 3(4) of the Terrorism Act 2000 that the PMOI had been and remained an organisation concerned in terrorism....”*

313. The reference to this interview with Mrs Rajavi in February 2006 would thus appear to elevate it to a position of some considerable significance in the context of the material relating to the PMOI statements about the renunciation of violence. It is the only specific additional material identified and referred to by the Secretary of State in any of the decision and related documents and in the evidence in support of the decision which purports to set out the PMOI’s current “policy” or views (that is as at February 2006).

314. The record of the Los Angeles Times “interview” itself is at **[3A/5/332]**. It referred to Mrs Rajavi as being “*of the Mujahedin Khalq, which has been officially designated a terrorist group by the United States and the European Union*”. The report referred to the fact that a legislator each from Britain, France, Belgium and Portugal were on hand to endorse her and demand that her group be removed from lists of terrorist organizations, and concluded as follows: “*But she declined to rule out armed intervention, saying, “The tactics and methods have been imposed not by us, but by the mullahs”.*”
315. How this document (the only recent document referred to by Mr Fender in his First Witness Statement) came to form part of the FCO “assessment” in his evidence before the Commission was not made clear in his evidence. However, it appears from the Open Exculpatory Material **[6/128]** (that is information not relied upon by the Secretary of State in support of the decision) that a FCO File Note which is undated but said to have been prepared on the 6<sup>th</sup> February 2006 (apparently as a result of an advertisement in The Times on the 4<sup>th</sup> February 2006 which called for de-proscription of the MeK, and claimed that MeK had not been involved in “military action” since July 2001) may be the source of Mr Fender’s reference.
316. This File Note provides some further context to the Los Angeles Times report:

*“January 2006: Speaking off record a senior MeK official claimed that the organisation has “rejected armed struggle and committed itself only to non-violent means of struggle and therefore asks the relevant authorities to remove it from the lists of terrorist organisations.” However in a subsequent interview with the LA Times, Maryam Rajavi refused to be drawn on whether the use of violence was still an MeK option, say [sic] that “the tactics and methods have been imposed not by us, but by the mullahs.”*

However, no assessment of the validity or credibility of the LA Times report is made in this Note.

317. It is surprising that Mr Fender chose to rely in his evidence upon the cryptic terms of the LA Times report of the “interview” of the 1<sup>st</sup> February 2006 without making any reference to the equally relevant report of the statement made by the MeK official in January 2006 referred to in the File Note.

318. It does not appear that any of this information was “assessed” for the purposes of the decision or that any of this information was provided to the Secretary of State before the decision was reached or formed any part of the decision-making process.
319. It appears to have been introduced into Mr Fender’s evidence before the Commission to provide some recent information (that is at February 2006). Without it it would have been apparent that in reaching his decision the Secretary of State did not rely in relation to this issue on any evidence more recent than Messrs Mohaddessin and Abedini’s Witness Statements in the First Appeal in 2002/2003.
320. The evidence now before the Commission (see Mr Mohaddessin **[1/C4/45]** Paragraphs 43-48) is that there was no “interview” as such by the LA Times. The reporter was merely one of the members of the press who attended a press conference given by Mrs Rajavi on the 31<sup>st</sup> January 2006. Mr Mohaddessin, who was present, does not recall Mrs Rajavi being asked to, and declining to, rule out armed intervention. None of the open reports from other sources (AFP, the Iran Focus Website and the website of the NCRI **[4B/4/31-35]**) make reference to the words apparently quoted by the LA Times reporter although Mr Mohaddessin appears to concede that the words may have been used but “any such statement would have been referring to the early 1980s when the armed struggle against the Iranian regime began”.
321. Lord Russell-Johnston was also present at the press conference. In a late Witness Statement (25<sup>th</sup> July 2007 at **[1/C8]**) he produced further reports of the press conference and confirmed that to the best of his recollection Mrs Rajavi was not asked about “armed intervention” and therefore did not decline to rule it out. He states that “Had she done so, this is something [he] would remember, as it would have been inconsistent with what [he has] heard from her in meetings over recent years.” Lord Russell-Johnston indicated that he did not believe that the words quoted by the LA Times were said, but that if they had been he would have understood it as a “passing reference to earlier

times”. Finally Lord Russell-Johnston went on to make an “assessment” of the motivation of the reporter identifying features to suggest that the report might be connected to propaganda put out on behalf of the Iranian Government.

322. Despite the fact that Mr Fender refers to the LA Times report as material in support of the Secretary of State’s decision, in our view this information formed no part of the decision making process. If this 2006 information alone had been put before the Secretary of State and did in fact form part of the decision making process, it would have been subject to valid criticism. Not only was the 2006 information incomplete, but it is clear that those advising the Secretary of State made no attempt to make a reasonable assessment of the validity or credibility of the report.
323. On its face the Commission recognises that the report is likely to be some form of propaganda adverse to the PMOI. In this respect we refer specifically to the description of Mrs Rajavi “*of Mujahedin Khalq*” and “*of the secretive exile group Mujahedin Khalq speaks out at a rare news conference*”. Given that the press conference was given by Mrs Rajavi at the headquarters of the NCRI near Paris and, as reported by AFP, as head of the NCRI, the LA Times references to Mujahedin Khalq give some indication of slant against the PMOI. Lord Russell-Johnston makes some further relevant points to this effect.
324. The reference to this one LA Times report in February 2006 against the background of the existence of a large number of reports of speeches by Mrs Rajavi suggests that what Mr Fender may have done since the date of the Secretary of State’s decision is to search for evidence to support a particular case rather than to put forward the evidence relevant to the issue that was relied upon in September 2006. Simply reading the documents disclosed by the Appellants in the Application for Deproscription provides some evidence of public statements by Mrs Rajavi which could be read sympathetically as a rejection of violence. For instance [4D/3] in a video message to thousands at Wembley on the 14<sup>th</sup> December 2003 it is reported that she said “the

resistance condemns any form of violence as a matter of principle” and see [4D/31] at page 8 first column of the leaflet of the 2005 National Convention for a Democratic, Secular Republic in Iran, in Washington DC April 14, 2005.

325. The Commission finds that the material relating to the Maryam Rajavi interview in 2006 does not provide material that could have assisted the Secretary of State in reaching a reasonable belief as to the current policy of the PMOI to future violent action. Given that it does not appear in fact to have formed any part of his decision making process, it is any event, irrelevant.

**F. CONCLUSION ON THE FIRST STAGE DECISION (Issues 6 and 8)**

326. The decision of the Secretary of State at the First Stage was flawed for a number of reasons.

327. The starting point must be a critical appraisal of the Submission to the Secretary of State and the accompanying 2006 JTAC assessment and the Decision Letter that resulted. To that task, as with the other material before us, we have subjected it to the intense scrutiny which we see it as our duty to undertake. We would however add that, even were we to have adopted the conventional public law yardstick of *Wednesbury* unreasonableness, on the facts of this case our conclusions would have been the same.

**(i) Failure properly to direct himself as to the law**

328. In our view, in three respects the Secretary of State failed properly to direct himself in accordance with law. These overlap:

328.1. the Secretary of State failed properly to direct himself to the requirements of the 2000 Act;

328.2. the Secretary of State failed properly to direct himself that each of the criteria in section 3(5)(a) to (d) of the 2000 Act required a belief that

the PMOI was presently (i.e. at the date of the decision) actually concerned in terrorist activity as defined;

328.3. The Secretary of State failed properly to direct himself as to the requirements of section 3(5)(d) of the 2000 Act.

329. At Paragraph 144 we have identified the important omissions from the Decision documents.

330. The Submission confines itself essentially to a relatively short series of observations designed to refute the grounds advanced on the Appellants' behalf. No attempt is made to review any of the other material which in our view was clearly relevant to a proper approach to answering the First Stage question. That question was whether or not the PMOI was at the time of the refusal to deproscribe an organisation which "is concerned in terrorism" as defined in section 3(5) of the 2000 Act. That serious deficiency may, at least in part, be accounted for by a complete absence in the document to any reference to the statutory framework defining the scope of the Secretary of State's duty.

331. The Decision Letter also fails to set out the statutory tests.

332. In our view the absence of any reference to the relevant statutory tests in either the Submission or the Decision Letter indicate that the Secretary of State failed properly to direct himself as to the requirements of section 3(5) of the Act. Further, we are satisfied that the approach adopted by the Secretary of State to the analysis of whether or not, on the facts, any of the statutory tests were met demonstrates that the Secretary of State cannot properly have directed himself as to what the 2000 Act required before he could conclude that the PMOI met the requirements imposed at the First Stage of the decision. This is discussed further below.

333. That conclusion is further reinforced by the terms of paragraph 11 of the Submission. This advised the Secretary of State in the following terms:

Given the long history of PMOI involvement in terrorism (dating back at least to the 1970s) it is reasonable to be cautious when considering if the PMOI has ceased to be concerned in terrorism simply because there has been a period when they have not claimed responsibility for terrorist acts. Although we do not have conclusive evidence of PMOI involvement in terrorist attacks after the end of 2001 the key issue is whether this demonstrates (as claimed) that the PMOI has “abandon[ed] all military activity”. In short, can the period of 5 years in which no terrorist attacks have been claimed be regarded as providing strong/convincing evidence that PMOI has abandoned such methods?” [Our emphasis]

334. Although we note that the Submission then goes on to record that the application does not rely simply on “mere inactivity” (which we discuss further in paragraph 348 below), in our view paragraph 11 turns the statutory test on its head. Instead of asking the relevant and required question as to whether at the date of the decision the PMOI is concerned in terrorist activity and, if so, in what manner, the Submission assumes (correctly) that the PMOI has been in the past concerned in terrorist activity but then asks a different question namely whether the passage of time is strong and convincing evidence that terrorist activity has been unequivocally and permanently abandoned. This is another illustration, in our view, of the misleading preoccupation with the renunciation of violence. Indeed, the absence of a public renunciation of violence was central to the Secretary of State’s case. Furthermore, the reference to “claimed” responsibility for attacks contains the implication that there have been attacks albeit that no claims have been made for responsibility, without any attempt to assess whether or not there have in fact been any attacks and, if so, by whom. Since this is also identified as the “key issue”, it also follows that the error goes to the heart of the decision making process.

335. Further, although paragraphs 5 and 8 of the Decision Letter assert that the Secretary of State had:

*“paid careful attention to all other relevant information available to me from my department and other government departments...For the avoidance of doubt, when considering this application I have paid careful attention to the need to consider the reliability of all the information before me...”.*

we are not satisfied that the Secretary of State properly directed himself as to the requirement on him to conduct a review of all available material, including

but not limited to the matters put forward by the Appellants. We have dealt with this at paragraphs 74 and 75 above. We say that because it is evident from our review of the material that the Secretary of State failed to carry out any such review. The Submission and its supporting documents are almost entirely devoted to rebutting the points advanced by the Appellants and it is very clear that the Secretary of State did not have or make available to himself all of the information relevant to his decision. Either the Secretary of State failed properly to understand the requirements of the 2000 Act, or he failed to apply them properly; either way the decision is flawed.

336. Of particular relevance to the present appeal is Section 3(5)(d) of the 2000 Act. On analysis this was the only sub-section which in principle might be applicable to the facts of the present case. As we have set out above, on the facts, there was no material available which could properly and reasonably lead to the belief that the PMOI had engaged in any form of terrorist acts or otherwise prepared for terrorism since (at the latest) May 2002. This was recognised and accepted by the Secretary of State in the passage in the Submission set out above and in the Decision Letter at paragraph 23. It follows that, as at the date of the decision, the PMOI did not fall within section 3(5)(a) or (b). Although in argument before us, Counsel for the Secretary of State relied on section 3(5)(c), it does not feature in the Decision Letter (as we have set out in Paragraph 209 above) and is not, in any event, of assistance for the reasons set out at Paragraphs 210 and 211 above. That material affords no basis for a conclusion at the time of the Decision that the PMOI was encouraging terrorism.

337. That leaves section 3(5)(d). The effect of Counsel for the Respondent's submissions under sub-paragraph 3(5)(d) of the 2000 Act, was that the phraseology "otherwise concerned in terrorism" meant no more than that the organisation retained a future will to re-engage in terrorism if or when future circumstances permitted. In our judgment even if on the material before us this could amount to anything more than pure speculation, to advance such a construction as affording a legitimate basis for a conclusion that the PMOI should remain proscribed is clearly at odds with the terms of the Act.

338. We have already set out our conclusion as to the proper construction of section 3(5)(d) of the 2000 Act (see paragraphs 125 to 128 above). Even if it were to be the case that the material before us could lead to a conclusion that the PMOI did retain a future will of that nature (which we doubt), an inchoate intention of that kind does not satisfy any of the statutory tests set out in subsection 3(5) of the 2000 Act as amended including specifically section 3(5)(d). To entertain a secret mental reservation namely that although the organisation is no longer concerned in terrorism it might in the future resume terrorist activities if and when circumstances were judged to make it necessary is not, without more, in our view to be presently “concerned in terrorism”.

339. This misconception, in our view, lies at the heart of the Secretary of State’s decision. The nature and extent of the misdirection is illustrated by the terms of the last two sentences of paragraph 23 of the Decision Letter (which as Counsel for the Respondent submitted represent the concluding paragraph of the decision at the First Stage):

Mere cessation of terrorist acts do not amount to a renunciation of terrorism. Without a clear and publicly available renunciation of terrorism by the PMOI, I am entitled to fear that terrorist activity that has been suspended for pragmatic reasons might be resumed in the future.

This is a fear that something *might* happen in the future rather than a belief that, as a matter of fact, the organisation is currently concerned in terrorism. It betrays a misdirection by the Secretary of State as to the requirements of the 2000 Act: see Paragraph 105 above.

340. Further, the Secretary of State imposed additional, unlawful requirements on the Appellants before he would conclude that the PMOI was no longer concerned in terrorism. These may well be attributable to serious misconceptions revealed as central to Mr. Fender’s evidence:

340.1. that the failure publicly to renounce terrorism was at the core of a rational refusal to deproscribe;

340.2. that the failure to demonstrate a voluntary decision to disarm in 2003 supported the same conclusion.

341. We have already commented on these two requirements at paragraphs 297 to 302 above. They were treated by the Secretary of State as absolute requirements of the 2000 Act, when they are not. This is evident from paragraph 9 of the Decision Letter:

“If I am to be persuaded that such an organisation is no longer ‘concerned in terrorism’ for the purposes of section 3(5) of the 2000 Act, I would expect (at least) a clear, voluntary, renunciation by its leadership of the organisation’s involvement in terrorism, together with a voluntary abandonment of its arms by its members.”

342. For the reasons we have set out in paragraphs 300 and 301 above, the requirement to demonstrate a voluntary decision to disarm was impossible for the PMOI to meet: once they had been completely disarmed, and the Secretary of State took the view that the disarmament was not voluntary, the PMOI could never change that. Similarly, the failure publicly to renounce terrorism was a condition which the Secretary of State was unlikely ever to accept had been fulfilled given his views about the reliability of statements emanating from the PMOI and its leaders. In our view, the real duty of the Secretary of State was to weigh those two matters against all the other material touching upon the history of the PMOI since 2001/2003. In treating them as an absolute requirement, he erred in law.

**(ii) Failure to take account of relevant considerations**

343. The failure to recite the statutory requirements or any of them led to a complete failure to identify which of them were applicable to the facts before the Secretary of State either in the Submission or in the Decision Letter. It follows that on that ground alone, the decision is flawed.

344. Further (as set out at Paragraph 133 above) if officials failed to bring to the Secretary of State’s attention material considerations which he was bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence must be that the decision is flawed irrespective of whether or not

officials within any of the relevant departments had knowledge of the considerations in question. Similarly, if, on a fair reading of the documents put before the Secretary of State, we are satisfied that the advice from officials had not adequately set out matters or considerations which might affect the assessment of the Secretary of State in discharging his duty to determine whether he believed on reasonable grounds that the PMOI was concerned in terrorism at the date of his decision, the decision would also be flawed. As will be apparent from our review of the Decision Documents and the relevant facts in detail above, we are satisfied both that the Secretary of State did not have before him all the material relevant to his decision and that the advice from his officials did not adequately set out all relevant considerations which might affect the Secretary of State's decision at the First Stage. The effect of that material is, we believe, sufficiently summarised at paragraph 168 above and is not repeated here. It was not considered either adequately or at all in the Decision Documents or the Decision Letter.

345. Indeed, in some respects the Decision Letter was clearly incorrect. For example, in paragraph 13 of the Decision Letter the Secretary of State states that "*during the period between the Summer 2001 and Spring 2003, the number of attacks claimed by the MeK declined substantially*". In fact, there were no claims made by the PMOI during that period with the exception of the May 2002 report which was immediately withdrawn. In other areas, the Secretary of State did not have available to him the relevant material. Thus, for example, paragraph 23 of the Decision Letter states "*...I have no evidence to support these assertions [i.e. that the PMOI's military branch in Iran was definitively dissolved after 2002]*". As we have set out above in paragraphs 160 to 162 above, there was material available to him on this question but it was not drawn to his attention. That passage also illustrates the undue focus of the Secretary of State on the precise allegation made by the current Appellants: as we have set out in detail above, on a proper analysis of the evidence it was incontrovertible that the PMOI had in fact ceased military operations inside Iran by, at the latest, 2002. This leads to a further fundamental criticism of the Decision Letter that, to the extent that he considered them at all, the Secretary of State looked at the post-2003 events

solely for the purpose of determining whether they afforded support for the contention that there had been a public renunciation of violence or whether there was some other reason for the cessation of violence. This was to ask himself the wrong question. What he ought to have asked himself was what the material actually showed and specifically whether it gave reasonable grounds for a belief that the PMOI was still currently concerned in terrorism at the time of the decision some three or more years later.

**(iii) Conclusion in relation to the misdirections and failure to take account of all relevant considerations**

346. These failures served fatally to undermine the integrity of the decision. On that basis alone, the decision to refuse to deproscribe is flawed. It cannot be sustained and must be set aside.

**(iv) Perversity**

347. In this case, however, there is a further dimension which we must address. We have to examine all the material that was or could reasonably have been available to the Secretary of State in order to consider whether the PMOI was or could honestly have been believed by him to be concerned in terrorism. We have subjected all the material to the intense scrutiny which we have indicated we believe to be the appropriate standard for our appraisal.

348. We have already set out in detail our conclusions on the material before us. In our view, intense scrutiny of the material requires the conclusion that:

348.1. With the possible exception of the single questioned incident in May 2002, the PMOI has not engaged in terrorist acts in Iran or elsewhere since August 2001.

348.2. Even if the PMOI had a military command structure at some point within Iran, the material demonstrates that such structure had ceased to exist by (at the latest) the end of 2002.

348.3. Even if the three reports in 2002 could amount to glorification within Section 3(5)(c) of the 2000 Act, all such activity ceased by August 2002;

348.4. In May 2003, the PMOI was disarmed;

348.5. There is no material which indicates that the PMOI has obtained or sought to obtain arms or otherwise reconstruct any military capability despite their capacity to do so after May 2003;

348.6. Further, there is no material to suggest that the PMOI has sought to recruit or train members for military or terrorist action;

In short, there is no evidence that the PMOI has at any time since 2003 sought to re-create any form of structure that was capable of carrying out or supporting terrorist acts. There is no evidence of any attempt to “prepare” for terrorism. There is no evidence of any encouragement to others to commit acts of terrorism. Nor is there any material that affords any grounds for a belief that the PMOI was “otherwise concerned in terrorism” at the time of the decision in September 2006. In relation to the period after May 2003, this cannot properly be described as “mere inactivity” as suggested by the Secretary of State in his Decision Letter. The material showed that the entire military apparatus no longer existed whether in Iraq, Iran or elsewhere and there had been no attempt by the PMOI to re-establish it.

349. In those circumstances, the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the maintenance of their proscription. In other words, on the material before us, the PMOI is not and, at September 2006, was not concerned in terrorism.

**G. THE SECOND STAGE – THE EXERCISE OF DISCRETION (Issues 6 and 8)**

350. The Appellants also sought to challenge the exercise of the Secretary of State's discretion to maintain the proscription of the PMOI, that is the Second Stage of the decision-making process.

351. The legal issues raised were incorporated in Issues 9 to 11 of the Agreed Legal Issues as follows:

**Issue 9** - Did the Secretary of State's refusal to de-proscribe the PMOI (and the consequent operation of the regime of offences under the TA 2000): (a) constitute an interference with the Appellants' rights under Article 10(1) and 11(1); if so (b) is such interference in pursuance of a legitimate aim; and (c) justified, for the purposes of Article 10(2) and 11(2)?

**Issue 10** – If an organisation is an organisation concerned in terrorism for the purposes of the TA 2000, is the nature of the government which that organisation opposes a relevant factor for the purposes of determining whether, the Secretary of State should, in the exercise of his discretion, proscribe/maintain the proscription of that organisation? Is the answer to this question affected by the fact that an interference with the Convention rights under Article 10 and/or 11 must be "necessary in a democratic society"?

**Issue 11** – The Secretary of State, when making and maintaining his discretion to proscribe, took account of foreign policy considerations that were not connected to the prevention of terrorism by the PMOI. Were these considerations (i) legally irrelevant, and/or (ii) not in pursuit of a legitimate aim which might justify interference with Convention rights under Articles 10(2) or 11, or Article 1 of the First Protocol?

352. In the light of our conclusions on the First Stage of the decision-making process it is unnecessary for us to decide these issues. In deference to the extensive submissions addressed to us, however, we will record below what our conclusions would have been had we had to decide these issues. In doing so we do not address all of the arguments raised by the parties.

353. In very short summary, we agree with the submissions advanced by Counsel for the Respondent on these issues. The Second Stage is only reached if the Secretary of State has lawfully determined that the organisation is concerned in terrorism. The issues raised in the present case concern the proportionality of the restrictions imposed on the Appellants' rights under the Convention

(i.e. that the restrictions are necessary in a democratic society because they are proportionate to the aim in view). For obvious reasons, it is not suggested by the Appellants that restrictions on the activities of a terrorist organisation or support for such an organisation could never be necessary in a democratic society.

354. Although it is correct that the Appellants' rights under the Convention are limited by the provisions of the 2000 Act which we have set out above, it is clear to us that those provisions are legitimate and proportionate. As we have already indicated, the questions raised under this head of challenge relate to issues (of national security and foreign policy) to which considerable deference must be afforded to the Secretary of State. Even without giving such deference, we would have reached the same conclusion.

355. In particular:

355.1. We have already set out our view that the clear legislative intent behind the 2000 Act is to ensure that the activities of organisations which carry out, support or promote acts or threats of terrorism against either the UK or foreign governments and their peoples should be circumscribed.

355.2. We agree with Counsel for the Respondent that the concept of "national security" is not limited to those activities that directly affect the United Kingdom or the interests of the United Kingdom and its citizens abroad. It clearly extends to the creation of national and international political conditions which are favourable to the protection or extension of national values against both existing and potential enemies. The 2000 Act reflects that general policy.

355.3. We also agree with Counsel for the Respondent that national security is the necessary foundation for the protection of the values of democracy and human rights inherent in the European Convention and that terrorist activity threatens the collective security of the community of

nations. Although currently limited to the activities of individuals and organisations associated with Al Qaeda (and thus not to the PMOI), UN Security Council Resolutions 1368/2001 and 1373/2001 illustrate the importance attached by the international community to the fight against terrorism.

- 355.4. Restrictions which prevent a person supporting an organisation that is concerned in terrorism while, as in the present case, leaving the individuals free to campaign for political change in another state (here, Iran) by peaceful and democratic means, are in our view clearly proportionate and lawful. In the present case, there were no restrictions on the ability of the Appellants to campaign for change in Iran by peaceful means just as there were no restrictions on their ability to raise funds for or otherwise promote organisations which sought to achieve such change by methods that are consistent with the democratic ideal. What they were restricted from doing was providing support for an organisation that was, at least at the time of the original proscription, actively concerned in terrorism. The provisions of the 2000 Act, in our view, represent the least restrictive method necessary to accomplish the aim of circumscribing the activities of a terrorist organisation in the United Kingdom.
356. We were not persuaded by the Appellants that it was unlawful for the Secretary of State not to take into account that, on their case, the system of government in Iran is undemocratic and repressive. The Secretary of State was and is entitled to conclude that there is no right to resort to terrorism, whatever the motivation. Further, in our view, it is also correct that if the United Kingdom wishes to alter the behaviour of another state (including where it believes that the state in question is not acting within its own territory in accordance with international norms), it should seek that change in accordance with international law and through methods which are consistent with democratic values. As such, any democratic government is entitled to conclude that, even if it does wish to alter the behaviour of another government, it should not do so by permitting terrorist organisations whose

activities are aimed at that government from operating or gathering support in the United Kingdom.

357. We have already dealt with the allegation that the Secretary of State took account of irrelevant foreign policy considerations. This is founded on the assertion that the proscription of the PMOI was maintained either pursuant to an agreement with Iran and/or as a bargaining chip in the negotiations with Iran in relation to the latter's nuclear programme or as some kind of inducement to Iran to comply with its international obligations in relation to that programme. On all the material before us, those allegations are both unfounded (that is factually incorrect) and, even if, contrary to our findings, that was the intention of officials in the Foreign & Commonwealth Office, there is no evidence that the relevant decision maker in present case was aware of them or that he took them into account.
358. We also do not accept the more general challenge made by the Appellants that the Secretary of State should have disregarded any foreign policy considerations which were not strictly limited to the question of preventing terrorism by the PMOI in Iran. There is no legal basis on which the Secretary of State's discretion should be circumscribed in that way. As we have made plain, in our view, the clear legislative intent of the 2000 Act was to provide support to, amongst others, foreign states and their governments in the fight against terrorism. We accept that a working relationship with Iran and other states is important to facilitate the resolution of matters which affect key United Kingdom interests, including, in the present case, Iran's support for terrorism. As such, the effect of deproscription on that relationship is, in our view, a factor to which the Secretary of State can properly have regard in the exercise of his discretion at the Second Stage of the decision making process.

## **H. CONCLUSION (Issue 12)**

359. This appeal against the refusal of the Secretary of State to deproscribe the PMOI is allowed.

360. Although we would not have accepted the Appellants' case in relation to the decision at the Second Stage, in the light of the principles applicable on an application for judicial review, in our determination the decision at the First Stage was flawed and must be set aside. Further, having carefully considered all the material before us, we have concluded that the decision at the First Stage is properly characterised as perverse. We recognise that a finding of perversity is uncommon. We believe, however, that this Commission is in the (perhaps unusual) position of having before it all of the material that is relevant to this decision. In our view, that is a requirement of the 2000 Act and of the procedures adopted before this Commission. The material available to us is, therefore, wider, more extensive and more detailed than the evidence that is commonly before a Judge in the Administrative Court.

361. Issue 12 of the Agreed Legal Issues was in the following terms:

If the appeal is allowed, should POAC make an order under section 5(4) of the TA 2000, and what considerations are relevant to the exercise of POAC's discretion.

362. For all the reasons set out above, and pursuant to our powers under Sections 5(4) and 5(5) of the 2000 Act, we order that Secretary of State lay before Parliament the draft of an Order under section 3(3)(b) of the 2000 Act removing the PMOI from the list of proscribed organisations in Schedule 2.