Neutral Citation Number: [2017] EWHC 1930 (Admin)

Case No: CO/6361/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2017

Before:

THE HON. MR. JUSTICE OUSELEY

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Between:

SALMAN BUTT	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Mr Paul Bowen QC and **Ms Zahra Al-Rikabi** (instructed by **Bindmans LLP**) for the **Claimant**
Mr Oliver Sanders and **Ms Amelia Walker** (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing date: 6-9 December 2016

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Approved Judgment

Mr. Justice Ouseley:

1. On 17 September 2015, a press release was issued from the Prime Minister's Office and the Home Office entitled "PM's Extremism taskforce: tackling extremism in universities and colleges top of the agenda." It announced the coming into force on 18 September 2015 of the "revised Prevent Duty Guidance" issued in July 2015 under the Counter-Terrorism and Security Act 2015, CTSA, and entitled "A new duty to stop extremists radicalising students on campuses…." The purpose of this general Guidance and associated Higher Education Guidance was to explain how universities and other further educational institutions should give effect to their duty under s26(1) of the CTSA. The press release referred to 70 events on campuses featuring "hate speakers". Dr Butt was among six named, through oversight, as "expressing views contrary to British values" on campus. The Extremism Analysis Unit, EAU, within the Home Office had opposed the inclusion of names within the press release.

2. Mr Bowen QC for Dr Butt challenges two decisions or actions: (1) the lawfulness of the Prevent Duty Guidance documents themselves, and (2) the collection, storage and dissemination of data by the EAU. He challenges the lawfulness of the Guidance documents on the grounds that (1) they were beyond the powers in s29 of the CTSA, (2) they failed to comply with the duty in s31 CTSA to have particular regard to the duty to ensure free speech in higher education institutions, and (3) they breached common law and ECHR rights in relation to free speech, in their lack of clarity, legitimate need and proportionality. He reserved the right to argue that common law Wednesbury rationality should be replaced by the more structured concept of proportionality.

3. Mr Bowen contended that the collection, storage and dissemination of data by the EAU breached ECHR Article 8, interfering with the Claimant's privacy rights, unjustified by an accessible and foreseeable law, lacking a legitimate aim or pressing social need, and being disproportionate to any legitimate aim which it might have. He raised but did not develop an argument that, even if Article 8 were not breached, the actions of the EAU breached Articles 7 and 8 of the European Union Charter of Fundamental Rights, CFR; he wanted to reserve his position so as to argue elsewhere (1) that the CFR went further than the ECHR, in not requiring a reasonable expectation of privacy, and (2) that the common law with the Royal Prerogative were an insufficient legal basis for the collection, storage and dissemination of data. Mr Bowen sought permission to amend his grounds to raise an argument that the collection and storage of information about Dr Butt constituted unauthorised "directed surveillance" for the purposes of s26 of the Regulation of Investigatory Powers Act 2000, RIPA.

4. Dr Butt sought to stay a claim of unlawful indirect discrimination until after the SSHD's intended Equality Impact Assessment, and in the light of that intention, did not pursue the claim that issuing the Guidance breached s149 of the Equality Act 2010, the public sector equality duty. Dr Butt has also brought a claim for damages for defamation, breach of his ECHR Article 8 rights and for breach of the Data Protection Act 1998, DPA. I am not concerned with these damages claims.

Dr Butt

5. Dr Butt, a British citizen and practising Muslim, has a background in biochemistry, including a PhD. He is the editor in chief of Islam21C, a publicly accessible website describing itself as "Articulating Islam in the 21 Century." Islam21C was initiated by the Muslim Research and Development Foundation, and became separate in September 2015. Dr Butt holds what Mr Bowen said "might be described as orthodox conservative religious views", not unlawful and shared by many others. He has spoken at universities at the invitation of student societies, notably Islamic Societies, chaired or participated in panel discussions, and led prayers at mosques. He states that he supports rather than opposes values identified in the definition of "extremism" in the revised Prevent Duty Guidance: "democracy, the rule of law, liberty and respect and tolerance of other faiths and beliefs." He did not regard his views as "extremist" and did not support ISIS or any other extremist group or terrorism. Articles on Islam 21C condemned ISIS, warning vulnerable people not to support it.

6. Dr Butt states that he has been affected by being named as an "extremist" in the September 2015 press release, as he reads the press release, leading to invitations to speak at university Islamic Societies ceasing and to others falling away, and to his refusing some he did receive so as to avoid embarrassment to himself and those who invited him. The naming of him in the press release had been given wide publicity in the press and online. He states that the press release also implied that he was a "hate speaker", though not explicitly naming him as such.

7. I make no findings one way or the other about any of Dr Butt's views. Whether or not the press release named him as an "extremist" or "hate speaker", and whether or not he is an "extremist" or "hate speaker", and what the effect of the press release on him has been, are issues for the defamation and allied damages litigation.

The Counter-Terrorism and Security Act 2015

8. Part 5 of the CTSA, entitled "Risk of being drawn into terrorism", Chapter 1 "Preventing people being drawn into terrorism", states in s26 (1): "A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism." "Terrorism" has the meaning given in the Terrorism Act 2000, s1(1)-(4). This is a broad definition.

9. It means the use or threat of "action", (defined in subsection (2)) where:

> "(1)(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause."

10. By subsection (2) "action":

> "(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 outside the United Kingdom,…
>
> (c) a reference to the public includes a reference to the public 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."

11. The "specified authorities" for the purposes of the CTSA are listed in its Schedule 6. The Schedule lists local authorities, custodial institutions and probation services, police forces, health and social care providers, educational and child care bodies and, pertinently for this case, by cross-reference to s11 of the Higher Education Act 2004, universities and other further and higher education institutions. They all have roles in the protection of the young, vulnerable and disadvantaged.

12. S29 deals with guidance. By subsection (1), the SSHD "may issue guidance to specified authorities about the exercise of their duty under section 26(1)." By subsection (2), authorities to whom the guidance is issued "must have regard to any such guidance in carrying out that duty." This, unlike s26, is not an obligation to have "due" regard. There may be separate guidance for different matters and authorities. Before issuing it, the SSHD must consult the Ministers of the two devolved governments and "any person" she considers appropriate. Guidance takes effect on the day appointed by regulations approved by positive resolution of each House of Parliament.

13. Enforcement of the s26 duty is dealt with in s30. Where the SSHD is satisfied that a specified authority has failed to discharge the s26 duty, she may give directions to it "for the purpose of enforcing the performance of that duty." A direction, in turn, may be enforced by an application, impliedly to court, for a mandatory order. No directions have been made; the PDG treats them as a last resort. S26 does not provide for enforcement of guidance.

14. S31 is important to Mr Bowen's submissions about free speech and academic freedom. I deal with it later.

15. There are also monitoring provisions in s32. The specified authorities for the purpose of s26, which are higher and further education institutions, must give to the monitoring authority, here the SSHD or her delegate, "any information that the monitoring authority may require for the purposes of monitoring that body's performance in discharging the duty imposed by section 26(1)." That information includes information which specifies the steps which the body in question will take to ensure it discharges the s26 duty. The Higher Education Funding Council for England, HEFCE, is the monitoring delegate in relation to Relevant Higher Education Bodies, RHEBS, as Ofsted is for Relevant Further Education Bodies. The HEFCE has produced guidance about its framework for monitoring whether RHEBs have appropriately robust policies and processes to enable them to respond to the Prevent duty and are implementing them actively. (Unless otherwise stated, future references to RHEBs include RFEBs.)

The revised Prevent Duty Guidance for England and Wales and the Higher Education Prevent Duty Guidance both of 16 July 2015 (PDG and HEPDG)

16. The Prevent Strategy has evolved since 2003, broadening from its original focus on violent extremism so that in 2011, it aimed to tackle extremist and non-violent ideas "that are also part of a terrorist ideology." It aimed to stop people moving from extremism towards terrorist-related activity.

17. The revised PDG replaced earlier Guidance, dated January 2015, and came into force in March 2015, after consultation, and debate and approval in each House of Parliament. This earlier guidance contained limited guidance specific to higher and further education institutions, and nothing about external speakers and events; it had raised free speech and academic freedom concerns. The revised PDG omitted the sector specific guidance for those bodies, but it nonetheless applied to them. The HEPDG is "additional free-standing but complementary sector-specific guidance." As Mr Sanders for the SSHD submitted, they should not just be read together, "they are constituent parts of a single body of guidance." These two documents dated 16 July 2015 were brought into force on 18 September 2015 by statutory instrument dated 17 September 2015, accompanied by an Explanatory Memorandum, following debate and approval by positive resolution of each House of Parliament.

18. The status of the duty and guidance in the PDG is described at [4]:

> "The duty does not confer new functions on any specified authority. The term "due regard" as used in the Act means that the authorities should place an appropriate amount of weight on the need to prevent people being drawn into terrorism when they consider all the other factors relevant to how they carry out their usual functions. The purpose of the guidance is to assist authorities to decide what this means in practice."

19. The Introduction sets it context in [5-8]:

> "5. The Prevent strategy, published by the Government in 2011, is part of our overall counter-terrorism strategy, CONTEST. The aim of the Prevent strategy is to reduce the threat to the UK from terrorism by stopping people becoming terrorists or

> supporting terrorism. In the Act this has simply been expressed as the need to "prevent people from being drawn into terrorism."
>
> 6. The 2011 Prevent strategy has three specific strategic objectives:
>
> - respond to the ideological challenge of terrorism and the threat we face from those who promote it;
>
> - prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support; and
>
> - work with sectors and institutions where there are risks or radicalisation that we need to address.
>
> 7. Terrorist groups often draw on extremist ideology, developed by extremist organisations. Some people who join terrorist groups have previously been members of extremist organisations and have been radicalised by them. The Government has defined extremism in the Prevent strategy as: "vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces."
>
> 8. The Prevent strategy was explicitly changed in 2011 to deal with all forms of terrorism and with non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists then exploit. It also made clear that preventing people becoming terrorists or supporting terrorism requires challenge to extremist ideas where they are used to legitimise terrorism and are shared by terrorist groups. And the strategy also means intervening to stop people moving from extremist (albeit legal) groups into terrorist-related activity."

20. The Introduction describes the terrorist threats which Prevent is intended to deal with in the UK, and in [10] says this of Islamist extremism before referring to white supremacist extremism:

> "Islamist extremists regard Western intervention in Muslim-majority countries as a 'war with Islam', creating a narrative of 'them and us'. Their ideology includes the uncompromising belief that people cannot be both Muslim and British, and that Muslims living here should not participate in our democracy. Islamist extremists specifically attack the principles of civic participation and social cohesion. These extremists purport to

> identify grievances to which terrorist organisations then claim to have a solution."

21. The Introduction, before stating that the HEPDG should be read alongside it, ends:

> "12. In fulfilling the duty in section 26 of the Act, we expect all specified authorities to participate fully in work to prevent people from being drawn into terrorism. How they do this, and the extent to which they do this, will depend on many factors, for example, the age of the individual, how much interaction they have with them, etc. The specified authorities in Schedule 6 to the Act are those judged to have a role in protecting vulnerable people and/or our national security. The duty is likely to be relevant to fulfilling other responsibilities such as the duty arising from section 149 of the Equality Act 2010.
>
> 13.This guidance identifies best practice for each of the main sectors and describes ways in which they can comply with the duty. It includes sources of further advice and provides information on how compliance with the duty will be monitored."

Parts of the sector specific guidance which did not apply to higher and further education institutions were relied on in argument. The risk-based approach to the Prevent duty recognises that risks vary greatly but authorities "should demonstrate an awareness and understanding of the risk of radicalisation" in their body, and give due consideration to it. Three themes were set out: effective leadership, working in partnership and appropriate capabilities. At [38], under the heading "Risk Assessment" the PDG said:

> "We expect local authorities to use the existing counter-terrorism local profiles (CTLPs), produced for every region by the police to assess the risk of individuals being drawn into terrorism. This includes not just violent extremism, but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit. Guidance on CTLPs is available here."

This is repeated at [19] of the HEPDG.

22. At [64] dealing with schools, it said, in a passage also to be found in relation to other sectors:

> "Being drawn into terrorism includes not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit."

23. The Glossary of terms in the PDG includes the following:

> "'Having due regard' means that the authorities should place an appropriate amount of weight on the need to prevent people being drawn into terrorism when they consider all the other factors relevant to how they carry out their usual functions.
>
> 'Extremism' is defined in the 2011 Prevent strategy as vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.
>
> 'Non-violent extremism' is extremism as defined above, which is not accompanied by violence.
>
> 'Prevention' in the context of this document means reducing or eliminating the risk of individuals becoming involved in terrorism. Prevent includes but is not confined to the identification and referral of those at risk of being drawn into terrorism into appropriate interventions. These interventions aim to divert vulnerable people from radicalisation.
>
> 'Radicalisation' refers to the process by which a person comes to support terrorism and extremist ideologies associated with terrorist groups."

24. I set out the HEPDG later when dealing with the second ground raised in the Guidance documents challenge, which is specific to that Guidance.

A: The challenge to the Guidance documents

(1) The Guidance documents and the power in s29 CTSA

25. Mr Bowen identified the common aspects of the Guidance documents which underlay this first ground of challenge, under whatever head, which I can take largely from the PDG since the challenged theme is common to both and the HEPDG has to be read alongside the PDG. On this point, I accept that the two stand or fall together.

26. The PDG [7-8] and the glossary, and HEPDG at [19], he submitted, equated "terrorism" with "extremism", and "extremism" included "non-violent extremism". He pointed to [38] of the PDG dealing with risk assessment, repeated in [19] of the HEPDG, and reflected in [64] of the PDG. He focused on the words: "This includes not just violent extremism but also non-violent extremism…." "This" clearly referred back to the risk of individuals being drawn into terrorism. The risk, Mr Bowen contended, is therefore a risk of being drawn into non-violent extremism, that is being drawn into "active or vocal opposition to fundamental British values." The subsequent words in [64], "which can create an atmosphere…" were words of description or explanation and not words qualifying "non-violent extremism".

27. Mr Bowen contended that this approach was ultra vires s29 CTSA. The power in s29 was to give guidance about the exercise of the duty in s26. That duty on authorities was to have "due regard to the need to prevent people from being drawn into terrorism." The PDG, however, was not just about preventing people being drawn into terrorism, which were the limits of its lawful scope; it went well beyond the confines of ss26 and 29. The PDG was about preventing people being drawn into "extremism" including "non-violent extremism", a concept defined as "vocal or active opposition to fundamental British values."

28. Mr Sanders submitted that this analysis was a misreading of the PDG, based on a misunderstanding of the purpose of the power and the PDG. This was guidance and not direction. It had to be read with the Act and as a whole. Being drawn into terrorism included being drawn into support for terrorism. There was no clear dividing line between extremism and terrorism; the two were closely related. Preventing people being drawn into terrorism required the extremist ideologies used to legitimise terrorism to be challenged, and their promotion disrupted, as [7 and 8] of the PDG made clear. "Non-violent extremism" was always "caveated" in Guidance by the concept of a "risk of being drawn into terrorism".

29. The issue in my judgment is one of the proper construction of the guidance. The specified authorities, in the exercise of their functions, must have "due regard" to the "need to prevent" people from being "drawn into terrorism"; s26. The duty to have "due regard" is a stronger duty than simply a duty to have "regard"; the glossary is an accurate statement of various court decisions on similar wording in other legislation. The s26 duty relates to the need to prevent a process occurring, the process of being drawn into terrorism. It is not a duty to prevent terrorism as such, though that may be the ultimate aim. Guidance is within the scope of the Act if it is "about the exercise" of that duty. It is "about the exercise" of that duty if it concerns ways in which people can be prevented from being drawn into terrorism. The PDG and HEPDG would fall outside the powers of s29, if they purportedly gave statutory guidance about something other than the duty to have due regard to preventing people being drawn into terrorism, even if it covered that as well. That duty can however inform the proper interpretation of the guidance.

30. I turn to its language. First, the PDG does not "equate" "non-violent extremism" with "terrorism", on any reasonable reading. The source for this concern was not a fair reading of the guidance documents as a whole in their statutory context, but a focus on the word "This" in the second sentence of PDG [38] and HEPDG [19]. But it is not a reference back to "terrorism". It is a reference back to what risks drawing people into terrorism. Perhaps slightly clumsily in its text, it is making the point that either form of extremism may draw those exposed to it into terrorism. I regard that as clear from the statutory duty actually being considered. The whole context of the Guidance, the CTSA and the Prevent strategy is to reduce the risk of people being drawn into terrorism by extremism, violent or non-violent. It is clear from [7 and 8] of the PDG, and the language which follows the words "non-violent extremism" in [38] and [64]. Second, whether those words after "extremism", "which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit" are qualification or description or definition seems to me to matter not. They highlight what the PDG is driving at when focussing the mind of those to whom the s26 duty applies on what they need properly to consider. The words highlight the

nature of the risk, how the risk operates, and so what to look out for. The active opposition to fundamental British values must in some respect risk drawing others into terrorism before the guidance applies to it. If there is some non-violent extremism, however intrinsically undesirable, which does not create a risk that others will be drawn into terrorism, the guidance does not apply to it. There is no textual ultra vires.

31. Mr Bowen's suggested examples of peaceful non-violent opposition to fundamental British values would call for a careful and perhaps rather sceptical view by specified authorities of the effects risked by a particular speaker's record and words. Calling for the peaceful and democratically chosen establishment of non-democratic regimes, whether a theocratic Sharia based regime or Soviet style communist or ideologically Fascist regime, raises obvious contradictions between aim and method, and the risk that hastening the intended aim will affect the choice of means, in speeding up what history, national destiny or God's will makes inevitable. His examples show that the line may not be easy to draw or the judgment to make; but that does not begin to show that the guidance is outwith the powers of s29. In so far as any issue of clarity or vagueness in the PDG gives rise to a vires issue, and I confess that I was not sure how all the many criticisms paraded in his case about the demerits of the PDG played out in relation to all Mr Bowen's submissions, I see nothing in them to make the guidance ultra vires on that ground.

32. Although "terrorism" had a broad definition in the Terrorism Act 2000, Mr Bowen submitted that that definition should be construed strictly, following *R (Miranda) v SSHD* [2016] EWCA Civ 6, [2016] 1 WLR 1505, at [55]. In my judgment, *Miranda* has nothing to do with this issue; it was concerned with the effect which what the Court of Appeal saw as a literal interpretation of the definition had on whether some actions which constituted terrorism within s1(2), notably those at (a-d), could be committed, albeit not as criminal offences, without an equivalent mental element to that in (e). It concluded that Parliament would have spelt out the absence of the mental element if no such element were intended, rather than leave the definition to operate without it, covering thereby behaviour which was most unlikely to have been regarded as terrorism. This ground is not about the scope of the concept of "terrorism". The SSHD's case does not require her to put forward some over-broad concept of terrorism. She looks in her guidance instead to what ideas, words and actions, not terrorist of themselves, may draw someone into terrorism. The issue is about the role of non-violent extremism in that respect. The guidance documents are not ultra vires in that respect.

33. This ground of challenge is rejected.

(2) The Guidance documents and s31(3) CTSA

34. S31 of the CTSA applies to those specified authorities which are further or higher education institutions, and Scottish equivalents. It provides:

> "(2) When carrying out the duty imposed by section 26(1), a specified authority to which this section applies –
>
> > (a) must have particular regard to the duty to ensure freedom of speech, if it is subject to that duty;

> (b) must have particular regard to the importance of academic freedom, if it is the proprietor or governing body of a qualifying institution.
>
> (3) When issuing guidance under section 29 to specified authorities to which this section applies, the Secretary of State-
>
> (a) must have particular regard to the duty to ensure freedom of speech, in the case of authorities that are subject to that duty;
>
> (b) must have particular regard to the importance of academic freedom, in the case of authorities that are proprietors or governing bodies of qualifying institutions.
>
> (4) When considering whether to give directions under section 30 to a specified authority to which this section applies, the Secretary of State-
>
> (a) must have particular regard to the duty to ensure freedom of speech, in the case of an authority that is subject to that duty;
>
> (b) must have particular regard to the importance of academic freedom, in the case of an authority that is the proprietor or governing body of a qualifying institution.
>
> (5) In this section-
>
> "the duty to ensure freedom of speech" means the duty imposed by section 43(1) of the Education (No. 2) Act 1986."

35. The Education (No. 2) Act 1986, EA 1986, provides in s43(1)-(4):

> "(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
>
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with-
>
> (a) the beliefs or views of that individual or of any member of that body; or

> (b) the policy or objectives of that body.
>
> (3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out-
>
> (a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation-
>
> (i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and
>
> (ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and
>
> (b) the conduct required of such persons in connection with any such meeting or activity;
>
> and dealing with such other matters as the governing body consider appropriate.
>
> (4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for that establishment, issued under subsection (3) above, are complied with."

36. Premises occupied by a students' union which are not premises of the establishment in connection with which the union is constituted are nonetheless treated as premises of the establishment, by s43(8). S43 applies to universities, their colleges, higher and further education establishments, but not to schools to which other duties apply.

37. S31 CTSA requires the SSHD to have "particular regard" to the duty to ensure freedom of speech, and to the importance of academic freedom, in s43 of the EA 1986, in issuing guidance under the CTSA. These were areas of concern which had led to the amendment of the Counter Terrorism and Security Bill during its passage through Parliament. However, the guidance documents at issue were approved subsequently by Parliament.

38. It is also clear that the duty in s31(2)(b) relating to academic freedom applies to academic staff. It reflects the duty on the University Commissioners, in relation to "qualifying institutions", in s202(2)(a) Education Reform Act 1988 to have regard to the need:

> "(a) to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing

> themselves in jeopardy of losing their jobs or privileges they may have at their institutions."

This was introduced when academic tenure was ended.

39. S31(2) clearly imposes a duty on the specified authorities. I accept Mr Sanders' point that s31(3) does not require or, I would add, empower, the SSHD to give guidance to the authorities about the performance of their specific s31(2) duties. It is for the SSHD to have particular regard to their duties when issuing her guidance under s31(3). She cannot alter or inhibit the exercise of their own statutory duties under s31(2).

40. Mr Sanders is also right that the duties in s31(2)(a) CTSA and in s43 EA 1986 relating to freedom of speech, cover external speakers. However, the duties are not that external or visiting speakers must be allowed to decide that they wish to come to a campus, and then have their attendance and speech facilitated. It is rather the other way round. If they are invited, they should be allowed to speak, and not impeded or prevented from doing so.

41. The HEPDG deals with Relevant Higher Education Bodies, RHEBs, as the Guidance calls them. It notes in [1]:

> "RHEBs' commitment to freedom of speech and the rationality underpinning the advancement of knowledge means that they represent one of our most important arenas for challenging extremist views and ideologies. But young people continue to make up a disproportionately high number of those arrested in this country for terrorist-related offences and of those who are travelling to join terrorist organisations in Syria and Iraq. RHEBs must be vigilant and aware of the risks this poses."

42. This Guidance recognises that most institutions "already have a clear understanding of their Prevent related responsibilities", and demonstrated some good practice. The new duty was not expected to create large new burdens on them, but was intended "to be implemented in a proportionate and risk-based way." It required "properly thought through procedures and policies" to be in place, "properly followed and applied". It was there "to assist" authorities in how the s26(1) duty applied in practice. But guidance did not prescribe appropriate decisions; that was up to the institutions, on all the facts of the case.

43. "We would expect RHEB's to be delivering in the following areas." One area where "delivery" was expected was "External Speakers and Events". This was dealt with in [7-15]. RHEBs should have policies and procedures in place for the management of events on campus and use of their premises. The policies should apply to all staff, students and visitors "and clearly set out what is required for any event to proceed." RHEBs needed to balance their duties to ensure freedom of speech and academic freedom, and to protect the welfare of staff and students, and should not provide platforms for the commission of criminal offences such as the encouragement of terrorism. At [11], it said:

> "Furthermore, when deciding whether or not to host a particular speaker, RHEBs should consider carefully whether the views being expressed, or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups. In these circumstances the event should not be allowed to proceed except where RHEBs are entirely convinced that such risk can be fully mitigated without cancellation of the event. This includes ensuring that, where any event is being allowed to proceed, speakers with extremist views that could draw people into terrorism are challenged with opposing views as part of that same event, rather than in a separate forum. Where RHEBs are in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed."

This was a very contentious paragraph.

44. RHEBs should put in place a system for assessing risks associated with planned events, which would provide evidence as to whether the event should or should not proceed or whether action was "required to mitigate any risk". They should be aware of their existing responsibilities in relation to gender segregation. Staff involved in physical security should also be made aware of the Prevent Duty. Managing the risk of radicalisation was not just about managing external speakers; radicalised students could be the focal point for further radicalisation, and university staff should learn to recognise the signs of radicalisation, and how to react accordingly. "Active engagement" is expected by the RHEBs with "other partners such as the police and BIS regional higher and further education Prevent co-ordinators." There should be regular contact with these co-ordinators.

45. The nature of the risk assessments was elaborated in [19-20]:

> "19. RHEBs will be expected to carry out a risk assessment for their institution which assesses where and how their students might be at risk of being drawn into terrorism. This includes not just violent extremism but also non-violent extremism, which can create an atmosphere conducive to terrorism and can popularise views which terrorists exploit. Help and support will be available to do this.
>
> 20. We would expect the risk assessment to look at institutional policies regarding the campus and student welfare, including equality and diversity and the safety and welfare of students and staff. We would also expect the risk assessment to assess the physical management of the university estate including policies and procedures for events held by staff, students or visitors and relationships with external bodies and community groups who may use premises, or work in partnership with the institution."

46. An action plan should be developed to mitigate identified risks. Training and welfare support were also covered to help prevent people being drawn into terrorism, to

challenge extremist ideas which risked drawing them into terrorism, and to recognise vulnerabilities. Chaplaincy and pastoral support was important, as were IT policies for filtering sites with harmful content which could draw people into terrorism; this did not apply to the use of IT for research purposes, including by those working on sensitive or extremism-related research.

47. The relationship between the institution and its student union and other bodies was discussed. Institutions would need clear policies on what was or was not allowed on campus, and what was expected from unions and other bodies in relation to Prevent "including making clear the need to challenge extremist ideas which could risk drawing people into terrorism."

48. As Mr Sanders rightly pointed out, universities, through Universities UK, the umbrella body for University principals, and the NUS had already had responsibilities and practices for managing risks associated with external speakers, albeit that the new duty and guidance gives it an enlarged focus on what needs to be done to prevent people being drawn into terrorism.

49. The discharge of the s26 duty, submitted Mr Bowen, created real risks to both freedom of speech and to academic freedom. Hence the requirements of s31(2) in relation to specified authorities when having due regard to the duty in s26, and the duty on the SSHD, under s31(3) when issuing guidance. He submitted that the SSHD had failed to have the requisite "particular regard", and that that was evident from the terms of the Guidance, and the effect which, as drafted, it had had on RHEBs.

50. I note at the outset that this issue does not bite on academic freedom, at least so far as Dr Butt is concerned, and is unlikely to do so more generally. Dr Butt is not a member of the academic staff at a university. I accept Mr Sanders' submission that s31 is concerned with the academic freedom of academic staff as described in s202 (2) (a) of the Education Reform Act 1988. This does not give any rights to external speakers. There might be some external speaker invited by academics for academic purposes, to whom the guidance might apply, but no instances have been cited where application of the HEPDG has led to a cancellation of such a meeting. Besides an academic event is more readily controlled and its impact mitigated than, say, a student meeting.

51. Mr Sanders is right that the focus of s43 EA 1986 is on making sure that those who are invited are able to speak, and not on enabling the speaker to seek invitations. Dr Butt is not receiving invitations, and is refusing those he has received. He does not speak of even one example, nor is there other evidence of one, where the application of the HEPDG by an RHEB has led to an event at which he had been invited to speak, being cancelled by the RHEB. The absence of invitations to speak is attributed by him to the press release, "labelling him as an extremist". So the actual issue he raises is quite remote from him.

52. I also make the obvious point, but it can be forgotten in the welter of material critical of the guidance on all sorts of bases, that no RHEB has challenged it or provided, as an institution, evidence that it has created difficulties in practice for the values of freedom of speech and academic freedom, though a number of academics have criticised the wording of [11]. I deal later with the evidence about what happened at Huddersfield University, but it is not evidence to the contrary.

53. Turning to Mr Bowen's contentions, he pointed first to what he called the conflation of "terrorism" with "extremism including non-violent extremism;" I have dealt with that and it gains nothing from the context of the specific obligation in s31.

54. Second, he pointed to what he labelled the "direction" to RHEBs in [11] of the HEPDG to cancel an event or to ban a speaker if they were not "entirely convinced" that the risk that people would be drawn into terrorism could not be "fully mitigated." Much argument related to the meaning and effect of [11] of the HEPDG.

55. Mr Sanders submitted that the HEPDG meant that the risk had to be insignificant; the mitigation had to be so far as could be or was proper; the degree of unmitigated risk then would fall for consideration by the institution under its s31 duty. Institutions were simply not "required to ban" all speakers expressing opposition to fundamental British values, as he said Mr Bowen had contended. The circumstances in which an event should not be allowed were those where there was a risk that the extremist views would draw people into terrorism, and where those views could not be challenged by opposing views, and those were difficult to foresee.

56. I entirely understand why the last and second last sentences of [11] can be seen as very restrictive. The RHEB must be "entirely convinced" that the risk is "fully mitigated", or "fully mitigated" without any doubt. Otherwise, the RHEB should exercise caution and not allow the event to proceed. In this context, I would have thought that was a nigh-on impossible task with some speakers, though the suggestion that it was a requirement that all who opposed fundamental British values should be banned is rather wide of the mark.

57. Mr Sanders' interpretation of the guidance is close however to submitting in effect that the proper interpretation of the guidance, albeit in context and read alongside other guidance, is not what an ordinary reading of the words would yield. His analysis was more nuanced, less absolute, and more reflective of the fact that the HEPDG concerned but one strand of the duties to which the institutions were subject.

58. In my judgment, [11] of the HEPDG means what it says on a straightforward reading of its quite simple language. The notion of "full mitigation" could mean mitigation as far as reasonably practicable or mitigation so that there was no significant risk, and without doubt could mean without any reasonable or significant doubt. But in the context of cancellation if full mitigation cannot be achieved beyond doubt, I do not think that that Mr Sanders' more nuanced reading is right. If the guidance meant what Mr Sanders said, it should have said so. But I have to add, that where RHEBs have interpreted the HEPDG as Mr Sanders submitted they should have done, it will lie ill in the mouth of the SSHD to complain. And if she wishes to revise the wording to reflect his submission, she can always do so. Even on Mr Sanders' reading, though some of the sting might be removed, many of the issues about the relationship between the guidance and the s31 duties would remain.

59. Third, it is at this point important to remember what the issue is which Mr Bowen raises with this point. It is that the SSHD did not comply with her statutory duty in s31 (3) CTSA. The general language of the HEPDG does not support the submission that she failed to do so; it makes many references to the importance of academic freedom and freedom of speech. The passage complained of in relation to external speakers does not do so either in my judgment either in relation to academic freedom

or freedom of speech. It is of course perfectly possible to devise different lawful guidance, but that cannot conceivably show that the SSHD ignored her duty in drafting the HEPDG.

60. If the risk had been mitigated, so far as reasonable, and the risk remaining and doubts would lead to cancellation, applying the guidance, that is simply not the end of the matter. Risk, mitigation, and the balance with freedom of speech or academic freedom would remain still to be considered by the RHEB under s26 and s31. That is where, as I read it, the HEPDG is saying that the judgment about the balance between the risk and freedom of speech should then be made under s26 and s31 by the institution in question. That is in law where the duty on the RHEB lies. This guidance was approved by Parliament which had earlier expressed its concern for the protection of freedom of speech and academic freedom.

61. The HEPDG and PDG are guidance and not direction, let alone free-standing ones; the obligation on RHEBs is to have regard to them. Institutions are responsible for their own decisions, including those related to external speakers on campus. But the duty of an institution, considering the application of the guidance in a concrete case, is to consider it along with its duties in relation to academic freedom and freedom of speech, for which purpose it should have established a code of practice, under s43 EA 1986. What the guidance says is that where risks cannot be mitigated so that they are eliminated, the meeting should be cancelled. The institutions are then entitled to say, having had regard to the application of the HEPDG, that the freedom of speech duties and the academic freedom duties to which they have to pay particular regard, are more important. They have to consider the degree to which they have mitigated the risks as fully as they realistically can, and the nature and degree of the risks that they cannot remove. But that done, they are not in breach of their duties under s29 or s26 or s31 if they decide to proceed. Their actions may not comply with the terms of the HEPDG, but the HEPDG is not law, and the duty in s29 has to be reconciled with other particular duties.

62. When considering the Prevent duty under s 26 to have "due regard to the need to prevent people from being drawn into terrorism", the institution itself has a separate duty under s31 to pay "particular regard" to ensuring freedom of speech and to the importance of academic freedom. The Prevent duty in s26 to have "due regard" does not override the s31 duty to pay "particular regard". The two have to be considered together. The s29 duty in relation to the guidance documents is notably less weighty: it is to "have regard" to the guidance.

63. The HEPDG could have set out more fully what I concluded the position is; but it was not unlawful to say what it did, and leave the institutions to make the clear judgment that the other interests overrode its application in any particular case. Even on Mr Sanders' softer language, as I have said, that would still have remained the position.

64. It is no evidence that the SSHD failed in her duty in s31(3) to have particular regard to the values of freedom of speech and academic freedom, that the guidance requires a meeting not to be held if the risk could not be fully mitigated, but leaving the institution to say that its duties in relation to free speech and academic freedom meant that it had decided to go ahead. It would, and importantly, have had to consider mitigating the risks and the value of the freedom of speech or academic freedom involved in running the risks it had decided to run. It reflects a clear view of the

importance of the Prevent duty in academic institutions, and the relative lack of importance attached to visiting speakers whose risk of drawing people into terrorism cannot be fully and clearly mitigated. But that leaves the decision on whether to invite or maintain the invitation of such a person clearly as one for the institution which can reach a decision contrary to the guidance if it considers that it should, having considered mitigation and degree of risk.

65. Mr Bowen's proposition that the guidance had to be applied in the absence of good reasons not do so, was not disputed in this context. It was based on *R (Munjaz) v Merseyside Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148. I doubt the value of that simple proposition where the institution in question is subject to three separate and differently expressed duties to consider various factors in the exercise of their functions. Two, s31 and s29, may conflict with each other. The institution is obliged not to follow the guidance if it took the view that to do so would put it in breach of its other duty, in s31. A decision to that effect would certainly supply the good reason for not following the guidance; and the s31 duty could never be lawfully disapplied by reference to the guidance.

66. Fourth, Mr Bowen supported his argument by reference to the way in which HEFCE, the monitoring body, had described how it would approach the guidance. It recognised that it would be for the RHEBs themselves to decide how best to implement their responsibilities, and would interpret the guidance documents in their own circumstances. But it expected to see the "rationale behind particular decisions. If an organisation considers that part of the statutory guidance does not apply, we will expect it to be able to justify that opinion." The guidance was central to its framework for monitoring compliance with the Prevent duty.

67. I see nothing unlawful with that in relation to s31(3). The law requires that the various duties are fulfilled. That requires consideration of the guidance. The guidance cannot and does not require the other duties to be ignored or breached. Compliance with those other duties provides the lawful, and it would seem unimpeachable justification, for differing from what the guidance would require.

68. Fifth, Mr Bowen also submitted that the HEPDG meant that RHEBs "are likely to give insufficient weight to their duty to ensure free speech under s43 of the 1986 Act. D has therefore failed to have "particular regard" to the duty of RHEBs to ensure free speech in s43 of the 1986 Act, as required by s31 (3) CTSA." This is not even an allegation that they would err in law, let alone that the SSHD has erred. But if RHEBs fail in their duty, notwithstanding lawful guidance, that is a matter for challenge to their decisions. Guidance cannot be unlawful simply because, through misunderstanding their duties, others may act unlawfully. They are not advised by the HEPDG to act unlawfully. Mr Bowen drew attention to the variations in practice among universities in the light of the guidance. The issue, under this head, is whether the SSHD did in reality have particular regard to the twin factors in s31(3) duty when issuing the guidance. I cannot see that they are relevant to that issue. I consider them in relation to the Article 10 issue.

(3) Article 10 ECHR: freedom of expression

69. Mr Bowen contended that the PDG and HEPDG breached the Claimant's Article 10 rights. He also contended that they breached his rights under Articles 9 (right to

manifest one's religion) and 11 (freedom of assembly) but as they added nothing to his claim in relation to Article 10, he confined his submissions to that Article. This provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

70. **Victim:** the first issue is whether the Claimant is a victim for the purposes of s7 Human Rights Act 1998. The Defendant says that he is not, whereas Mr Bowen submits that he is, and comes within the scope of a potential victim which suffices.

71. The Claimant has no Article 10 right to go on to any university premises for his own purposes; and he has no right to be invited.

72. The Claimant does not give evidence of any invitation which he says has been withdrawn because of the PDG or HEPDG. I accept that he has received fewer invitations than he would have expected. He has had no invitations to speak from universities, whereas he would have expected several on past experience. However, the tenor of his first witness statement, is that this was caused by his being named in the press release, as he reads it, as an "extremist"; people would have invited him but for his being tarnished as an "extremist." He has turned down invitations which he has received to avoid embarrassment to himself or to his hosts; he describes this as self-censorship. Press articles have followed the press release naming him as an "extremist". His second statement specifically describes the problems which he says he has experienced "as a result of the publication of the press release." Invitations from mosques have reduced or dried up because of the press release and the effect that that has had on them. I cannot give weight to the opinion of an unidentified friend, expressed without examples, that the implication of what was happening was that anybody holding a meeting with an "extremist" was liable to have funding withdrawn. The Claimant's focus on the effect of the press release is not surprising in view of its public immediacy. He says that none of his views are those of an "extremist" within the HEPDG definition anyway. If a public body were to take steps which arguably interfered with his Article 10 rights, he would be in a position to challenge it, and the proportionality of the decision could be examined.

73. These self-evidently are not proceedings by an RHEB to which the HEPDG is applicable. Their reactions to it, as expressed in their Codes, vary. But not one has complained that they have had to refuse to invite the Claimant to speak, or to prevent

others doing so or to cancel a meeting arranged for him to speak at. Indeed, they have not said that about anybody. On the face of it, the claim that anyone's freedom of speech, including the freedom to impart or to receive information, has been interfered with by the HEPDG, is entirely unsupported by evidence.

74. The only evidence produced by the Claimant which begins to address any such issue is that of Ms Scott-Baumann, who is Professor of Society and Belief at the Centre of Islamic Studies at SOAS, University of London. She describes herself as "an academic researcher and activist philosopher" who was "motivated to investigate the negative impact of the Prevent Duty on Muslims and free speech." I am not clear whether the view that there was a negative impact was the subject of the research or a view already formed. Her research, she said, showed that Muslims were becoming fearful and self-censoring. She organised a conference at the end of October 2016 attended by government and the Henry Jackson Society; discussion "was robust and will lead to action to influence others through parliament and continued debate with those who service and augment this surveillance culture." She quoted the Chief Operating Officer at Queen Mary College as saying that the Prevent duty and all the other monitoring and compliance demands led to "administrators 'sleep walking' " into changing "policies on academic freedom, management of external events etc. without fully recognising…their legal requirements to uphold freedom of speech". The risk of media exposure and the process of applying for permission had become a disincentive for student groups to invite speakers and "creates a de facto situation of censorship." She made many criticisms of the Prevent Duty, but nothing else that really added to the impact on freedom of speech.

75. One instance only was given of an event said to be cancelled because of the effort required to get through bureaucratic procedures. This related to a conference on "Racism and Islamophobia" cancelled in July 2016 as speakers, for that event, declined to sign up to Huddersfield University's "Freedom of Speech and External Speakers Policy" issued on the same day as the conference was to be held. Speakers disagreed with aspects of that policy. The policy required organisers to answer questions about external speakers, including whether they had been prevented from speaking at a university, had expressed views which breached the University's Freedom of Speech Policy or were "deemed to be extreme in that they are opposed to the fundamental values of our society", or whether there was reason to believe that the speech could cause concerns related to that Policy, for example through media interest, large attendance, significant controversy. Professor Miller, Professor of Sociology at Bath University, elaborated his concerns about Huddersfield University's Policy and its differences from the HEPDG. He complained of the time it took to go through procedures. But in reality this was not about bureaucracy or procedures but about some participants not wanting to sign up to the Freedom of Speech policy which the University had promulgated for its external conferences and rejecting the role of the "strong chair" who would intervene strongly should such views be expressed challenging fundamental British values. His FOIA requests produced what he regarded as evidence of excessive and time-consuming intervention by the Prevent Coordinator, accepted by the University, over the need for a "strong chair". I accept that the operation of the guidance will mean, as the various University Codes show, a greater bureaucracy over some meetings, time-consuming too. But I am quite unable to accept that this evidences some general chilling effect. Nor does it evidence a cancellation as a result of the HEPDG. If the Huddersfield

Code pays insufficient respect to academic freedom or freedom of speech, on which I express no view, the answer is that its decision should be challenged. They have not been nor has its Code. This is wholly inadequate as a basis for concluding that the PDG or HEPDG has interfered with the Claimant's Article 10 rights, or indeed those of RHEBs or their students to invite him, or indeed anyone else.

76. Mr Bowen contended that his evidence demonstrated that the guidance had and was likely to have "a grave impact on rights of free speech in Universities of both [the Claimant] and others". The chilling effect could occur when a speaker was "banned" or when no such decision was taken. In my view his clamorous evidence does no such thing.

77. There may be a good reason for that want of evidence, which is that it has not happened. The Prevent duty does not require freedom of speech to be interfered with, and I do not doubt that RHEBs are fully aware of their duties, under s26 CTSA to have due regard to the need to prevent people being drawn into terrorism, under s29 CTSA to have regard, in so doing to the PDG and HEPDG, and under s31 to have particular regard to the duty to ensure freedom of speech.

78. Mr Bowen said that the guidance documents breached Article 10 generally because they "authorise restrictions on persons such as [the Claimant] from expressing opinions and sharing those opinions with others in a public forum." This is a significant misreading of the guidance and its relationship to statutory duties.

79. Mr Bowen grouped his evidence about restrictions and chilling effect under the heading "Concerns about the Prevent Duty and Guidance". It all lead to a conclusion which Mr Bowen expressed thus in paragraph 112 of his Skeleton Argument:

> "There is growing opposition by a broad coalition of organisations and individuals to a number of aspects of the Prevent strategy, including those aspects of the Prevent Guidance that are challenged in these proceedings as affecting rights of free speech and free assembly and freedom of religion. In particular, there is significant opposition to the extension of the Prevent Duty in the Prevent Guidance to include 'non-violent extremism', the vague and overbroad definition of 'extremism' and 'British values' and the guidance that Universities must prevent speakers if they are not 'entirely convinced' any risk of a person 'being drawn into terrorism' cannot be 'fully mitigated'. The concerns raised are directly relevant to the legality and proportionality of the prevent Guidance as developed at paras 186ff, below."

80. The opinions he put in evidence express a variety of views indeed critical of the PDG or HEPDG for a variety of reasons; but most do not address the impact on freedom of speech or do so with no specific evidence to support such fears as they express. Most of it shows rather limited understanding of the duties on RHEBs. It is of no assistance on the interpretation of the documents. They could not possibly be persuasive as to an actual interference with the Claimant's Article 10 rights. Some universities may have been criticised by politicians for allowing certain speakers to speak; but I see nothing in the ECHR which requires politicians to abstain from such criticism, merited or not.

This general attack left the law far behind. This case is not about the merits and wisdom of the Prevent Duty or Guidance or of its opponents, both of which could be debated endlessly but not in court.

81. The Claimant is not a victim simply because he makes generalised assertions, which is at best all that he does, that his rights will or could be breached in the future. The Claimant must show that he is directly affected; as with English and Welsh notions of standing, the issue may be bound up with the merits of the case. Breach goes beyond the question of interference, because if he established an interference, the public body would be entitled to show that it was justified and proportionate, in the specific context, and having specific regard to what he wanted to say, where and to whom. He has no right to go on to a university campus to express his views.

82. Mr Bowen submitted that it is not necessary for an individual to prove that his rights have been interfered with in order for him to be a victim. The concept can be introduced by the following extract from the Strasbourg Court's "Practical Guide on Admissibility Criteria" (2015) 60 EHRR SE8:

> "26. In certain specific situations, the Court has accepted that an applicant may be a potential victim. For example, where he was not able to establish that the legislation he complained of had actually been applied to him on account of the secret nature of the measures it authorised (*Klass and Others v Germany*) or where an alien's removal had been ordered, but not enforced, and where enforcement would have exposed him in the receiving country to treatment contrary to Article 3 of the Convention or to an infringement of his rights under Article 8 of the Convention (*Soering v the United Kingdom*).
>
> 27. However, in order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient…
>
> 28. The Court has also underlined that the Convention does not envisage the bringing of an actio popularis for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it may contravene the Convention (*Aksu v Turkey* [GC], § 50; Burden v the United Kingdom [GC], § 33).
>
> 29. However, it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risks being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation..."

83. *Klass v Germany* (1979-80) 2 EHRR 214, [34], and *Szabo and Vissy v Hungary* (2016) 63 EHRR 3, [33] related to the particular problem of secret surveillance measures, and the importance of ensuring effective control over them. An individual could claim to be a victim "on account of the mere existence of legislation permitting secret surveillance, even if he cannot point to any concrete measures specifically affecting him." Otherwise Article 8 could be reduced to a nullity.

84. At [36] and [38] of *Szabo and Vissy*, the ECtHR said this:

> "36 In the case *of Kennedy v the United Kingdom* the Court held that in order to assess, in a particular case, whether an individual can claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court must have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there is no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such cases, even where the actual risk of surveillance is low, there is a greater need for scrutiny by the Court.
>
> Most recently, the Court adopted, in *Zakharov v Russia*, a harmonised approach based on Kennedy, according to which firstly the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affect all users of communication services by instituting a system where any person can have his or her communications intercepted; and secondly the Court will take into account the availability or remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies…
>
> 38… The Court considers that it cannot be excluded that the applicants are at risk of being subjected to such measures should the authorities perceive that to do so might be of use to pre-empt or avert a threat foreseen by the legislation – especially since the law contains the notion of "person concerned identified… as a range of persons" which might include indeed any person."

85. The Claimant is not facing circumstances comparable to those which troubled the ECtHR in *Klass*, and *Szabo and Vissy*; those were concerned with secret surveillance and where a person enquiring about whether he was a subject of interest would be met by a form of "neither confirm or deny" response. That did not happen; he made a subject access request, and was told what was held. I observe that that group of decisions is peculiar to Article 8 because of the covert nature of so much potential

interference. This is not a feature of Article 10 in anything like the same way, though no doubt instances could be postulated.

86. The Claimant, submitted Mr Bowen, was in a category of persons targeted, and to whom the law could be applied; he ran a reasonably foreseeable risk that it would be applied to him and so was entitled to seek a remedy now. He was among those who could be excluded from university invitations in the future and would never know that he had been excluded. His information continued to be processed in secret.

87. I disagree. He would know if an invitation had been withdrawn. I find it difficult to accept that he will not know if an invitation has been discussed but not issued, because those who favoured his attendance are likely to let him know. He has received invitations. The Claimant cannot say in my judgment that, because he is in a group which may be affected, he has a right to a remedy now. He is in reality asserting an inadmissible actio popularis. The evidence from Ms Scott-Baumann and Professor Miller rather reinforces my conclusion that what the Claimant is bringing is a general action, relating to events or possible events of which he is not a victim nor likely to be, and which are only to be judged in the light of concrete facts, events and justifications. At most, it shows that some think that the RHEBs are not fulfilling their duty in s31. It shows that Ms Scott-Baumann dislikes the existence of the whole duty; and seeks to campaign against it for many reasons, which is her right. It did not advance this case.

88. *Le Ligue de Musulmans de Suisse v Switzerland* (App.No. 66274/09) of 8 June 2011 is a good illustration: a Swiss constitutional change precluded the building of minarets for mosques. The Ligue alleged that this violated the religious freedom of all Muslims. At the level of generality at which the case was brought, it was inadmissible. The change had not been implemented, and had no practical effect on them. There were no highly exceptional circumstances conferring victim status on them. If there were any practical effect, they could then challenge the compatibility of the change with Article 9, by reference to what actually had happened to them.

89. As with the *Ligue de Musulmans*, when the Claimant is refused an invitation or a meeting is cancelled by reference to the Prevent duty or guidance, he or his disappointed host, can challenge it, and the proceedings will have the benefit of some facts to go on rather than the generalised, wide ranging and ill focused material with which I have been favoured.

90. In *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357, Guardian Newspaper journalists, who had written articles calling for the establishment of a republic, sought a declaration that the Treason Felony Act 1848 was incompatible with Article 10 or did not cover calls for the non-violent departure of the monarchy. The Court of Appeal had permitted such an action to proceed in the Administrative Court. The House of Lords allowed the Attorney's appeal. Procedurally, this case has its limitations. Lord Steyn said that they were victims; it had been conceded and was obvious. But their Lordships all agreed that the whole proceedings were a waste of time because the journalists had published exactly what they wanted to publish, the notion of a chilling effect was far-fetched, because there was no threat or prospect of prosecution, since the 1848 Act was clearly incompatible with Article 10, if it affected non-violent calls for a republic in the UK. Lord Rodger described it as in substance

an actio popularis, [55], but that is what the ECtHR has set its face against, save in very exceptional circumstances.

91. The Claimant has received invitations but declined them. I do not accept that the fact that he may feel reticent about accepting invitations out of consideration for his host or himself amounts to a chilling effect imposed by way of a restriction on free speech of which he is a victim. He faces no threat to his livelihood, person or family or friends, or sanction for speaking. He has simply made a choice, which is up to him. There is no reason why he could not have made a different decision, and the consequences of his choice cannot be laid at the door of the HEPDG or asserted as a breach of Article 10.

92. He is in a very different position from *Norris v Ireland* (1991) 13 EHRR 186. Norris was a homosexual adult; it was a criminal offence to engage in homosexual conduct in Ireland, though the prospect of prosecution of consenting adults was minimal. Nonetheless he was a victim: the law could be applied at any time while it was on the statute book, and its existence reinforced prejudice against homosexuals and increased their anxiety and risk of depression, with sometimes serious consequences. Norris was a victim because he ran the risk of being directly affected. The legislation did interfere with his Article 8 rights.

93. The Claimant is also in a very different position from the professor in *Altug Taner Akcam v Turkey* (2016) 62 EHRR 12, decided in 2011. A professor of history, working on the history of the Armenian population of Turkey in 1915, wrote an article in a Turkish paper criticising the prosecution of its editor for the crime of "denigrating Turkishness", alleged because of his opinions on the Armenian issue. The applicant asked to be prosecuted also, out of solidarity. The prosecutor decided not to do so because of Article 10. The professor contested that, but although the Turkish Court then required the prosecutor to re-examine the case, the prosecutor continued to decline to prosecute him. The issue of whether he was a victim was considered along with the question of whether there had been an interference with his Article 10 rights. The Court held that there had been an interference notwithstanding the absence of prosecution, whilst affirming its established jurisprudence that the ECHR required that someone be directly affected by the impugned measure, and that there was no scope for an actio popularis complaint that a provision of national law contravened the ECHR.

94. The reasons for its decision are very relevant: the applicant was at risk of future prosecution; the complaints had led to a campaign of harassment, intimidation and hate mail. The risk of future investigation had caused him stress, apprehension and fear of prosecution; he had been forced to modify his conduct through self-restraint in his academic work to avoid prosecution. At [67-68], the ECtHR said:

> "67 However, the Court has concluded that an applicant is entitled to "(claim) to be the victim of a violation" of the Convention, even if he is not able to allege in support of his application that he has been subject to a concrete interference. In such instances the question whether the applicants were actually the victims of any violation of the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions (for the

> compatibility of art.301 of the Turkish Criminal Code see under (B) below). While the present case refers to freedom of expression and not to surveillance as in the Klass case, where the difficulties of knowing that one is under surveillance are a factor to be considered in the determination of victim status, the applicant has shown that he is subject to a level of interference with his art.10 rights. The applicant has shown that he is actually concerned with a public issue (the question whether the events of 1915 qualify as genocide), and that he was involved in the generation of the specific content targeted by art.301, and therefore he is directly affected.
>
> 68 Furthermore, it is also open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct because of it or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation. The Court further notes the chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future."

95. For those reasons, I am satisfied that the Claimant is not a victim of either guidance document, and this claim should not proceed. However, I feel duty bound to consider the next steps lest I am wrong on that score.

96. **Were the Guidance documents prescribed by or in accordance with the law?** Mr Bowen submitted that the Guidance documents were not in accordance with the law, so as to meet the ECHR test of lawfulness. This required any interference to be in accordance with a domestic law, which itself had to be adequately accessible and formulated with sufficient precision, the scope of any discretionary powers sufficiently delineated, and with sufficient legal safeguards against its arbitrary exercise, that an individual, appropriately advised, could regulate his conduct.

97. Mr Bowen did not challenge the compatibility of the provisions of the CTSA with the ECHR, and I have found that the PDG and HEPDG are not ultra vires, which was part of his submission as to why the guidance was not in accordance with the law. The question of whether the guidance meets, or indeed needs to meet, the requirements of accessibility and foreseeability is bound up with issues relating to the legitimacy of the aim and proportionality.

98. But the Guidance needs to be read and understood for what it is. It is just that: guidance. It does not direct an outcome, let alone "ban" or "direct" the banning of speakers. It must be considered, but "following it" in the absence of good reason can be a misleading approach, notwithstanding Mr Sanders' apparent concession. "Following it" requires no particular outcome but a consideration of factors, processes and steps. The guidance leaves it to the judgment of the RHEB as to whether the event should not proceed or proceed in whatever format or with whatever organisation it chooses.

99. As I have already explained, the balancing act, which Mr Bowen said failed to give due weight to the rights of the individual, does not need to be carried out within the guidance itself. The balancing act is for the RHEBs, having considered the Guidance, and their duties in s31 CTSA and s43 EA 1986. Mr Bowen said that the Guidance contained no explicit recognition of the importance of freedom of speech or political and religious matters. I do not agree with that, but the specific provisions of the CTSA show that when RHEBs reach decisions, they have to have particular regard to those issues. It is at that stage in the decision-making process that the balance is to be struck, and it is struck by the decision-maker not the SSHD.

100. I accept that there is a considerable area for judgment and debate between RHEBs and, say, Prevent Duty co-ordinators who advise on its application. To my mind that is not objectionable for a guidance document with the role this has. Indeed, many statutory duties, for better or worse, now take that form, and s149 Equality Act 2010 comes to mind. The Strasbourg jurisprudence accepts that a significant role for judgment by the decision-maker in the application of words, even in legislation, does not make the law inaccessible or unforeseeable. To my mind, this considerable area for judgment is only to be expected in this context and I find it difficult to see why RHEBs, with their specific duties, should find that objectionably vague, or potential speakers. There is no need for a more specific definition of "extremism"; the guidance left it to RHEBs to reach conclusions on the risk of an event drawing people into terrorism. The need for judgment of that sort does not make the guidance too vague for Article 10(2) requirements. The judgment would be context specific, in institution, speaker, topic, mitigation and audience. There was no assumption that all terrorism began with non-violent extremism, or that non-violent extremism necessarily led to terrorism.

101. Mr Bowen further submitted that the guidance was too unclear and uncertain to be lawful, pointing to the different ways in which RHEBs had interpreted or applied it, varying in this strictness or adherence. Neither institutions nor individuals knew how to regulate their conduct in order to comply with it.

102. I focus on what RHEBs have actually done, how they have operated with the guidance. I am not surprised that there are differences of approach, and that RHEBs have different Codes of Practice or Freedom of Speech Policies, introduced under s43 EA 1986. I have read these. Huddersfield, has a policy which covers external speakers in both a curricular and extracurricular context. The process starts with a questionnaire which refers to its own Freedom of Speech Policy and to whether the individual has expressed views or is affiliated to a body which has expressed views which are "extreme in that they are opposed to the fundamental values of our society." But if any of the relevant questions is answered yes, the event organiser must contact the Responsible Person who in turn can contact the University Secretary for approval, and in the event of refusal, the event organiser can appeal to the Deputy Vice-Chancellor, whose decision is final. Conditions and restrictions can be imposed on the event: numbers attending, who the "chair" should be, venue, requiring a balancing view, prior submission of the speaker's script, and security arrangements.

103. Birmingham University sets out general principles relating to freedom of speech and academic freedom in its Code of Practice on Freedom of Speech on Campus. It recognises the challenge in finding the point at which the pursuit of those freedoms becomes unlawful or poses unacceptable risks to others. The Code covers meetings

and events on campus generally including demonstrations. It applies where a teaching or research event involves a "potentially extremist speaker" or a VIP. The organiser has to follow the Code with the advice of the Authorising Officer or Director of Legal Services, or Head of Department. The policy recognises the importance of a balanced debate, which may require additional speakers with different views from the one initially to be invited. "So far as reasonably practicable", access to the university should not be denied on grounds solely connected with a person's views or beliefs, but it must consider the general law including that related to actions motivated by racial or religious hatred, the presence of proscribed organisations and "the duty to have due regard to the need to prevent people from being drawn into terrorism." Discrimination, harassment and segregation by gender would be carefully examined; the latter permissible only if wholly and demonstrably voluntary, before and at the event. The Authorising Officer must ensure, so far as practicable that participants including outside speaker comply with the Code.

104. There is an elaborate and tiered process for inviting outside speakers. The Authorising Officer considers the information on the application against the University's legal obligations and whether it poses any risks; if so he will assess those risks, and the measures proposed to counter them. If they created a risk of drawing people into terrorism, he consults other University officers to see whether they are convinced that the risk can be mitigated and the event managed appropriately. If the risks "can be adequately or fully mitigated (as appropriate)", permission is granted; and not if adequate arrangements cannot be made. The sort of management issues considered by Huddersfield also fall to be considered.

105. Sussex University was held up by Mr Bowen as an example of a University less constrained by the Guidance. Its Code of Practice on Freedom of Expression is certainly shorter than the others, noting the general problems of balance, and the duty in s26. That duty is incorporated into the risk assessment for holding events and the associated procedures. The University expressed its confidence that "in complying with our Prevent Duty, we will continue to handle events and speakers with a robust and proportionate approach and uphold our values." Those booking rooms agree to abide by the Code. The organiser must notify the University Secretary of a proposed speaker who might reasonably be considered "controversial" which includes those with extremist views, or any speaker from a political party. Conditions can be imposed, including that the speaker be balanced by others with opposing views. Permission can be withdrawn if it is later judged that the Code would be breached. There is a tiered process for inviting external speakers, in which the Prevent duty must be considered at all stages.

106. Cambridge University's Code issued under s43 EA 1986 applies to university premises. Individual colleges have their own Codes and practices, but the University requires each to nominate a senior member for that purpose. Where the relevant authority considered that the event "might reasonably be refused because of the duty to prevent people being drawn into terrorism", there was a process whereby it was sent to a Referral Group; only that Group could refuse permission because of the Prevent duty. It would do so "Only in exceptional circumstances and when [it] considers that there are risks which cannot be mitigated or the event organizer refuses to meet any conditions imposed…" There was then a right of appeal to the Vice-Chancellor.

107. Cambridge University's Statement on Freedom of Speech after referring to the duties and roles of a University in relation to academic freedom and freedom of expression, and the importance of freedom from discrimination, states that "Debate, discussion and critical enquiry are, in themselves, powerful tools in preventing people from being drawn into terrorism." The use of University premises should not be "inappropriately denied" to any person for reasons connected with their views, unless it is because of their membership of a proscribed organization, or because they are likely to encourage support for proscribed "(or outlawed)" organizations. The "lawful expression of controversial or unpopular views will not in itself constitute reasonable grounds for withholding permission for an event. Reasonable grounds for refusal would include… the fact that the event is likely to include the expression of views that risk drawing people into terrorism or are the views of proscribed groups; incite others to commit a violent of illegal act…"

108. Oxford University's procedures are not materially different, and refer to the duty in the CTSA; its "Statement on the importance of freedom of speech" is cast in a more general way, and emphasises that it should never prevent speech that is lawful. Views should be exposed to evidence, questioning and argument, in peaceful exchanges, with appropriate regulation of time, place and manner of events to prevent speaker and audience having any reasonable grounds to feel intimidated or censored.

109. What actually struck me was that the RHEBs in their different ways were taking a considered and careful approach to the s26 duty and the various risks faced by students, including that of being drawn into terrorism, as best they saw fit for their circumstances. There is a real danger in picking out a few words from what are often quite long documents with much explanation, and many expressions of concern for the various issues at stake and the task of balancing freedoms against the risk of the breach of other values, such as preventing discrimination, bullying, intimidation, extremism, incitement to terrorism, towards which Huddersfield for example expresses a zero tolerance. The policies often contain quite elaborate procedures whereby an initial refusal by the authorities to permit an invitation can be appealed internally.

110. I am far from sure that Mr Bowen is right to categorise them, by reference to the inevitably short passages he quoted, as differing in their unison with the wording of the guidance, which some appear to precede anyway. It seems to me that they are all in harmony with it rather than dissonant. Differences in emphasis are not forbidden by the guidance; it is about advising on or helping decision-making, not taking decisions for the institutions. The guidance requires certain issues to be considered, and then, whether within or outside the guidance, the RHEBs have to consider their other related duties. One way or another, they all do that and do it as they see best for their particular institutions. The SSHD has not suggested that any one of them is inconsistent with the PDG or HEPDG. I see nothing in them to warrant any contention that the guidance is not in accordance with the law.

111. **Does the Guidance serve a legitimate purpose and do so proportionately?** *Bank Mellat v Her Majesty's Treasury* (No. 2) [2013] UKSC 38 and 39, [2014] AC 700, at [20], Lord Sumption, and [68-76], Lord Reed, holds that i) the objective had to have a legitimate aim, sufficiently important to justify the limitation of a fundamental right, ii) the measure had to be rationally connected to the objective, iii) no less intrusive measure could have been used to achieve the objective and iv) whether, having regard

to those matters, a fair balance had been struck between the rights of the individual and the interests of the community; i.e. does the achievement of the legitimate aim nonetheless come at a disproportionate impact on the individual.

112. I accept Mr Bowen's submission, based on well-established jurisprudence, that freedom of speech includes the right to express offensive, provocative and contentious views, except where the offensiveness is of such a measure or degree that it amounts to a criminal offence, such as incitement to racial hatred, or where it tends to provoke violence. I accept that particular weight is given to the free expression of political or religious views, and interference requires particularly weighty justification.

113. In understanding the aim and proportionality of the Prevent Strategy and its related guidance, it is necessary to understand that the essential features of it were not new in 2016 or 2015. In the 2011 Prevent Strategy, the definition of "extremism" was not confined to violence but covered vocal or active opposition to fundamental British values in the same language as in the current PDG. The 2011 Prevent Strategy at 5.34 -5.38 said:

> "In assessing drivers of and pathways to radicalisation, the line between extremism and terrorism is often blurred. Terrorist groups of all kinds very often draw upon ideologies which have been developed, disseminated and popularised by extremist organisations that appear to be non-violent (such as groups which need to use violence nor specifically and openly endorse its use by others).
>
> Some politically extreme organisations routinely claim that: the West is perpetually at war with Islam; there can be no legitimate interaction between Muslims and non-Muslims in this country or elsewhere; and that Muslims living here cannot legitimately and or effectively participate in our democratic society. Islamist extremists can specifically attack the principles of participation and cohesion, rejection of which we judge to be associated with an increased willingness to use violence… Islamist extremists can purport to identify problems to which terrorist organisations then claim to have a solution.
>
> ...
>
> Evidence also shows that some people who have engaged in terrorist-related activity here have previously participated in extremist organisations...
>
> In some cases, people who have been radicalised to the point of approving of terrorism have passed through a prior extremist phase. But this is not always so. Some people are recruited into a terrorist organisation and radicalised at the same time."

114. Earlier, the summary of context said that terrorist groups can take up and exploit ideas developed and sometimes popularised by extremist organisations which operate legally in the UK. This had significant implications for the scope of the Prevent

Strategy. Some, but by no means all, of those who had been radicalised in the UK had previously participated in extremist organisations. There was evidence that support for terrorism was associated with the rejection of a cohesive, integrated, multi-faith society and of Parliamentary democracy.

> "Work to deal with radicalisation will depend on developing a sense of belonging to this country and support for our core values."

115. In the summary of the framework for Prevent in 2011 the government had said that it remained absolutely committed to protecting freedom of speech but that preventing terrorism "will mean challenging extremist (and non-violent) ideas that are also part of a terrorist ideology. Prevent will also mean intervening to try to stop people moving from extremist groups or extremism into terrorist-related activities."

116. I do not need to set out the threat to the United Kingdom and Europe posed by terrorist-related activity. It was not part of the Claimant's challenge. But I regard it as obvious that understanding why people are drawn into terrorist-related activity, and seeking to prevent them from being drawn into that activity, is a proper and necessary activity of the state. Again, that was not at issue.

117. Mr Collins, the acting director of the Office for Security and Counter-Terrorism, Prevent Directorate, set out the background to and purpose of the Prevent Strategy in his witness statement. Part of his role involves oversight of the implementation of the s26 duty. The new Prevent Strategy arose from an increasing awareness that colleges and universities faced considerable challenges from radicalisation; the government was concerned to prevent them becoming "a permissive environment for extremism" and to do what it could to assist them. Part of that was introducing detailed guidance on managing the risks associated with external speakers on campus. Certain universities had a number of extremist events and "issues raised around extremism by local partners and where there was limited … engagement by the institutions with the higher education Prevent co-ordinators".

118. Mr Collins emphasised that the references to extremist views in the two guidance documents were references to those extremist views "which risk drawing people into terrorism."

119. The government presented its Counter-Extremism Strategy to Parliament in a command paper (Cm9148) in October 2015. The paper described the threat from extremist ideas in addition to the loss of life through terrorism and hate crime attacks. Part said:

> "Where extremism takes root and our values are undermined the consequences are clear. The social fabric of our country is weakened. Violence goes unchallenged. Women's rights are fundamentally eroded. There is discrimination on the basis of gender, race, religious belief or sexual orientation. There is no longer equal access to the labour market, to the law, or to wider society. Communities become isolated and cut off from one another. Intolerance, hatred and bigotry become normalised."

120. The paper then turned to the harm caused by extremism. It said at [9]:

> "Across the country there is evidence of extremists, driven by ideology, promoting or justifying actions which run directly contrary to our shared values. This causes harm to society in general and is used to radicalise vulnerable people. Increasingly, extremists make sophisticated use of modern communications, including social media, to spread their extreme ideology and attract recruits in large numbers."

121. The first harm identified from extremism was the justification of violence. The paper noted that a range of extremists can promote hatred of others and justify violence even without acting violently themselves. UK-based Islamist extremists reject democracy and glorify actions by extremist groups such as ISIL. They portray violence as inevitable in achieving the desired end state required by their ideology.

122. The second area of harm caused by extremism was the promotion of hatred and division.

> "Many hate crimes are motivated by extremist ideologies, often propagated by individuals who make a careful effort to stay just within existing legal parameters, exploiting the very freedoms they claim to despise in order to undermine our society."

123. The third area of harm from extremism was encouraging isolation. Encouraging individuals and groups to live separate lives, to distance themselves from society, institutions and shared values could cause alternative values, structures and authorities to gain prominence, permitting harmful behaviour to occur. The rise of alternative systems of law which did not all operate within the rule of law in the UK was a further example of the harm done by extremism. This could create particular problems for the legal status of women. Extremists could reject the democratic system; this was another harm from extremism. Extremists have attempted to coerce people not to participate in our democratic system or to subvert our democratic processes. Extremists "reject the very principles upon which democracy is based, forbidding participation on the grounds that democracy has no place in their extremist world view". Extremism also led to harmful and illegal cultural practices, such as FGM, forced marriage and honour-based violence. Educational institutions were increasingly targeted by extremists looking to use them to spread their ideology at schools, universities and colleges. Charities and prisons were also exploited.

124. The government's strategic response was not just to counter violent extremism but to counter the radicalisation of people so the new statutory duty targeted institutions particularly educational, health and police, probation and prisons, to make it clear that they had to take action to prevent people being drawn into terrorism. To this end, it had to counter the ideology of non-violent and violent extremists alike. So it sought to confront and challenge extremist propaganda, to build a partnership with those opposed to extremism, to disrupt extremists and to build more cohesive communities. The EAU had been established to support all government departments and the wider public sector "to understand wider extremism issues so they can deal with extremists appropriately."

125. Chapter 3 "countering extremist ideology" said that there was no single model of radicalisation but in general terms, three elements were present.

> "A vulnerable person would be introduced to an extremist ideology by a radicalising influence (typically an extremist individual) who in the absence of protective factors, such as a supportive network of family and friends, or a fulfilling job, draws the vulnerable individual ever closer to extremism."

Its own quote said:

> "no one becomes a terrorist from a standing start. It starts with a process of radicalisation. When you look in detail at the backgrounds of those convicted of terrorist offences, it is clear that many of them were first influenced by what some would call non-violent extremists."

That was the Prime Minister of July 2015. The paper continued:

> "Islamist extremists are driven by a core ideological need to overthrow the foundations of modern society and rid it of what they perceive to be un-Islamic elements, not only non-Muslims, but also Muslims who do not conform to their warped interpretation of Islam."

126. It set out in short form a summary of key elements of Islamist thought. This emphasised the argument that Islam was irreconcilable with the west and liberal democracy where religious reformation and purification go hand in hand with political unification under Sharia law. It said this of higher and further education:

> "Universities and colleges provide one of our most important arenas for challenging extremist views and ideologies."

It then described the Prevent duty. It continued:

> "We expect student bodies such as the NUS to avoid providing a platform for extremist speakers."

It referred to the role of the Prevent duty coordinators to support universities and colleges putting in place effective policies and processes for carrying out the requirements of the Prevent duty.

127. In my judgment, this all presents a sound rationale for the PDG and HEPDG.

128. Mr Bowen's first contentious submission was that, while accepting that preventing people being drawn into terrorism pursued a legitimate aim, the protection of the rights of others, the restrictions were only necessary and proportionate insofar as they related to external speakers who were likely to encourage or condone violent extremism or other unlawful acts, or to constitute criminal language. Preventing people being "drawn into non-violent extremism" was an inadequate justification for the restriction.

129. However often that phrase is used, it starts, in my judgment, from a fundamental misreading or misunderstanding of the guidance. The guidance is about the s26 duty; it is therefore about preventing people being drawn into terrorism through non-violent extremism. Non-violent extremism which carries no risk of drawing people into terrorism is not subject to the guidance. Once the risk is established that a non-violent extremist does pose such a risk, the guidance applies. It is not at issue that preventing people being drawn into terrorism is a legitimate aim.

130. Mr Bowen's next argument was that there was little or no evidence that those exposed to non-violent extremist views were drawn into terrorism; he drew upon the generalised comments from the "broad coalition".

131. I do not regard this evidence as useful, apart from the Parliamentary materials which give rise to quite different issues. It is not evidence of fact. It does not come as admissible expert evidence. It is not clear on what basis the selection of views was made, other than that they would support the Claimant, and disliked the Prevent duty or guidance. Some of the "broad coalition" are not experts at all; some say nothing about this issue but focus on the breadth of definitions. I see little value in going through all its inadequacies of knowledge, understanding, objectivity, and lack of explanation of their background, underlying views and conduct. Many of the witness statements seemed of a campaigning quality against the Prevent duty. I am not concerned with whether some oppose the CTSA, or regard the Prevent Duty as counter-productive or have made it so, deliberately or through misunderstanding it.

132. I take up here Mr Bowen's point about the vagueness of the concept of "non-violent extremism which risks drawing people into terrorism" with his contention that there was no evidence that non-violent extremism even risked drawing people into terrorism. The first is not so much the vagueness of "non-violent extremism", but of what forms of expression of non-violent extremism can draw people into terrorism. The second is causation: does "non-violent extremism" risk drawing people into terrorism? These are very closely related issues, closer to being the same point put a little differently. His argument fluctuated between that and contending that there was no evidence that it necessarily did. The SSHD never contended that it necessarily did. But this is where the thrust of Mr Bowen's arguments go, and in effect are the ways he contends that the previous two issues I have dealt with do not really arise.

133. To my mind, this contention is not made out at all. I accept that there may be two views about whether certain forms of non-violent extremism can ever draw people into terrorism. I am not sure how far those who say that it cannot do so really go before turning away with other aspects of their dislike for the legislation and guidance, but there are opposing views expressed by, for example, Sara Khan in "The Battle for British Islam" (2016).

134. However, my starting point is that the CTSA, with its balance of duties, and the Parliamentary approval of the guidance shows a Parliamentary and Governmental view that non-violent extremism can draw people into terrorism, and needs to be controlled in a careful balance with fundamental freedoms. This starting point has two aspects. First, it is clear that the importance of freedom of speech was very much to the fore in Parliament's concerns in passing the CTSA and in approving the PDG and HEPDG. Second, both Parliament and the Home Office, in differing ways, bring experience and expertise to bear on this issue. They are also accountable for the

decisions they make. The views of Parliament on this issue are entitled to considerable weight because of the experience which individually they bring to bear. The SSHD in particular will be informed by the experience of terrorists or terrorist suspects, whether convicted, controlled, here or travelling abroad. The protection of the rights of others from those who are drawn into terrorism is an area where their views are entitled to considerable respect.

135. I accept that the SSHD has not produced illustrative case studies of those whose radicalisation has included a component of non-violent extremism or a statistical analysis of those radicalised only by violent or non-violent extremism (and this may have something to do with the way the Claimant's case and evidence evolved not long before the hearing), but the fact that these guidance documents were produced pursuant to a statutory duty and approved by Parliament puts a heavy duty on a Court to require different evidence and analysis to support it, putting the Court in the position of Parliament and the SSHD, shorn of expertise, responsibility and accountability.

136. I have also cited extracts from the related Counter-Terrorism Strategy which sets in simple form how ideological, political and religious strands can lead to terrorism. I do not see this as anything particularly new, but rather an evolution of policy to deal further with a root cause of the process whereby people become terrorists. After all, while some may move directly to violent extremism, it seems reasonable to judge that at least some will move from non-extremist to non-violent extremist to violent extremist, for example where a sense of separateness, victimhood and alienation are fostered, which others may then exploit to turn someone to violence.

137. A process, which may not involve the same extremists or even be intended by non-violent extremists, can be seen with the latter preparing the way for others to exploit: i) an assertion of rigid purity and exclusive knowledge in religion or ideology, separating one from others of the same religion or ideology, who prefer interpretations or compromises better suited for life in a Western democracy; ii) this may be allied to the desire for political change to a religiously or ideologically driven state in which democracy has no place to confound the asserted will of God or to confound those who know the will of the people or the destiny of the nation; iii) a sense of personal injustice, hostility and group separation with religious or ideological justification follows; iv) so too does a sense of alienation from Western values and a fostered sense of victimhood, individually or as a group sustain the hostility; v) those who are not "for" these are "against" them, becoming enemies who must be confronted. Thus may be laid the framework of a sense of separateness, alienation, victimhood, but being at one with a rigid and pure version of religion or ideology; hostility to and rejection of democratic values and the rule of law then follow. This risks drawing people into terrorism as it is exploited to justify violence.

138. Mr Bowen submitted that it was unclear whether characterising homosexuality as a sin or opposing UK foreign policy in the Middle East would amount to non-violent extremism. Put in those deliberately simplistic terms, the question cannot be answered: language may or may not amount to non-violent extremism or risk drawing people into terrorism, depending on what is actually said about those matters. But asking whether language is or is not non-violent extremism, is to aim off the true target which is whether what is said risks drawing people into terrorism. Analysing the point is useful because it illustrates what the guidance says. Homosexuality could

be characterised as a sin and opposition expressed to UK foreign policy in the Middle East in language which was extreme, non-violent, and which, depending on the words used could or could not risk drawing people into terrorism. Taking an example other than those, and not one on which it is said that the Claimant has expressed views, adultery is characterised as a sin in at least three religions I can think of: holding that view cannot be of itself a non-violent extremist position. Arguing that adulterers should be stoned to death is violent extremism. Arguing that the law should be changed through non-violent democratic Parliamentary means, so that adulterers can be stoned to death in fulfilment of a divinely given law, could be non-violent extremism, and could be seen to create a risk of drawing people into terrorism. The argument might lead others, persuaded by it of the merit of the aim, to reject the means, as an impious impediment to God's rule on earth.

139. Such a position is not forbidden from public utterance on a university campus by an external speaker; the guidance would require the risk of an invitation to him or her to be assessed, the need for the views to be challenged would have to be considered, and if that was inadequate to remove the risk for certain, then the university would have to decide whether, all that notwithstanding, the right of the hosts to hear the speaker, meant that the risk of such an argument should be run. Where an external speaker left his position on that issue open so that people may conclude, and may be meant to conclude, that he supports some of such views, may give rise to difficult issues for RHEBs.

140. I regard it as plain that if non-violent extremism does risk drawing people into terrorism, then a degree of consideration, which may lead to RHEBs countering, mitigating or restricting that effect on its students towards whom they owe some safeguarding duty, (and ultimately that effect on the wider society of which they form part) is a legitimate objective for government to set for achievement through guidance. I am far from clear that Mr Bowen submitted otherwise.

141. The degree and nature of interference is limited. The Claimant and all others remain free to express his or their beliefs through all other means of communication at their disposal, including to students off campus or via social media. The adverse effect is very limited. *R (Lord Carlile of Berriew QC) v SSHD* [2014] UKSC 60, [2015] AC 945 includes at [41-43] citations from Strasbourg jurisprudence highlighting the relevance of the limited degree of interference by reference to the locations or mode where freedom of speech was restricted. The guidance applies only to external speakers on institutional premises where they have no right to go to express their views. They can use any other location or medium to communicate. The restriction may only bite to the extent that an external speaker may meet a controlled challenge to his views, or speakers expressing an alternative view as part of reasoned public debate. No sanctions attach to the expression of the views of the speaker who is permitted on to the campus, whether or not the institution has followed the HEPDG or considered it but decided that the guidance was overridden by its free speech duties in that particular case.

142. Mr Bowen's last substantial point was that the guidance documents were disproportionate because of the width of the discretionary area of judgment, claimed by the SSHD to have been granted by Parliament in the formulation of guidance. Freedom of speech was a matter in which the Courts had particular expertise, and no wide margin should be accorded to the Government.

143. However, in my judgment, the reason for the interference may mean that Parliament's or the Government's evident view is of particular weight; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 is an example, and binding, upheld (just) by the ECtHR (2013) 57 EHRR 21. The guidance pursued the legitimate aims of protecting national security, public safety, prevention of disorder and crime, protecting health or morals and the rights of others. Parliament's and the SSHD's expertise, institutional competencies and constitutional responsibilities and accountability required considerable respect for their judgments, applying the approach of the majority in Lord Carlile's case. On necessity, Mr Sanders submitted that the state had a wide margin of appreciation where speech might incite others to violence.

144. He referred to useful Strasbourg authority in support of the proportionality of the guidance. There had been no violation of Article 10 in the banning by Turkey of a book containing an abusive attack on Mohammed, as well as other offensive or shocking comments; *A v Turkey* (2007) 45 EHRR 30. The author was convicted of blasphemy and fired, but the book was not seized. In *Gündüz v Turkey (No. 1)* (2005) 41 EHRR 5, the leader of an Islamist sect was convicted of inciting hatred on religious rounds, and sentenced to two years in prison, because in a television broadcast on an independent channel, he described Turkish society as impious, fiercely criticised secularism and democracy, described the children of secular marriages as "bastards" (my translation of "piç"), and called for the establishment of a state based on Sharia law. His Article 10 rights were found to have been violated. It distinguished its earlier decision in *Refah Partisi (the Welfare Party) v Turkey* (2003) 37 EHRR 1, on the grounds that at the time of the dissolution of that party by legislation, it "had had the real potential to seize political power. Such a situation is hardly comparable with the one at issue in the instant case." Some of the comments are notably germane. The earlier part of [51] reads and continues:

> "51 As regards the relationship between democracy and Sharia, the Court reiterates that in Refah Partisi (the Welfare Party) v Turkey it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia. It considered that Sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts.
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> …
>
> Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Art.10 of the Convention. However, the Court considers that the mere fact of defending Sharia, without calling for violence to establish it, cannot be regarded as "hate

> speech". Moreover, the applicant's case should be seen in a very particular context. First, as has already been noted, the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.
>
> 52 In conclusion, having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Art.10."

145. The Court recognised that a state had a certain margin of appreciation when regulating freedom of expression in relation to matters "likely to offend intimate personal convictions within the sphere of morals or, especially religion". It emphasised that "tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society". Accordingly, in principle in some democracies "it may be considered necessary to sanction or even prevent all forms of expression which spread… or justify hatred based on intolerance… provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued."

146. Relevant to the Court's consideration were that the sect leader's views were already publicly known; the programme arrived to present his views, including that democratic values and Islam were incompatible; this topic was being widely debated as a matter of general interest; the format of the programme was designed to encourage debate about those views. The Court judged (i) that the comments showed profound dissatisfaction with secularism, and democracy without inciting violence or religious hatred, (ii) that calling offspring of secular marriages "bastards" was offensive but made live during active participation in lively public discussion and not thought of any great seriousness by the Turkish Courts, and (iii) sought a Sharia-based regime not through violence but persuasion.

147. The sanction for free speech was far removed from what the guidance requires here, yet it recognised the legitimacy of proportionate restrictions. It also illustrated the importance of reasoned public debate to whether a restriction was proportionate, which was what the guidance sought to promote, with challenges to extremist views to counter the risks that people would be drawn into terrorism.

148. In *Perincek v Switzerland* (2016) 63 EHRR 6, a Grand Chamber decision, the applicant was prosecuted for the crime of genocide denial; he denied there had been any genocide by Turks of Armenians in 2015. The Court observed that the fact that a legal provision was capable of more than one interpretation did not mean that it failed the requirement of foreseeability. Relevant factors to the proportionality of any interference with freedom of speech was whether the statements in question "were

made against a tense political or social background", whether they could fairly be seen, in both immediate and wider contexts "as a direct or indirect call for violence or as a justification of violence, hatred or intolerance." The Court asserted that it was "particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups. Statements were also assessed for capacity direct or indirect to lead to harmful consequences." It was relevant if they were made in a "pluralistic … debate" which counteracted their potential for harm. The Court's approach was very context-specific, and the interplay between factors mattered more than any individual factor taken in isolation. This decision is supportive of the proportionality of the guidance.

149. Two cases were cited in relation to the question of dealing with risks created by the exercise of freedoms of speech and assembly. The first, *Alekseyev v Russia* (Applications 4916/07 and others) 11 April 2011, concerned the banning of Gay Pride marches in Moscow, for fear, it was said, of counter-demonstrations leading to public disorder. In reality, [77], Strasbourg did not accept that that was the true reason. It also said that the assessment of the risk created by counter-demonstrations had been inadequate; the "mere existence of a risk" was insufficient for banning an event (which had been banned repeatedly). A "concrete estimate of the potential scale of disturbance" was required "to evaluate the resources necessary for neutralising the threat of violent disturbance." This does not advance Mr Bowen's argument: the truth behind the ban, the nature of the disorder threatened, and the repeated ban are very different contexts.

150. Of course, a risk assessment for each event at issue is required by the HEPDG. That is in line with Strasbourg's jurisprudence. But the more general nature and intent of the HEPDG does not call for more specific risk assessment. The HEPDG recognised that students included those who were vulnerable, away from home and perhaps isolated, who needed a degree of protection from extremism, even if non-violent, because of where it could lead. There is nothing new about this: it was a clear part of the thinking in the 2008 Department for Innovation, Universities and Skills paper "Promoting good campus relations… and preventing violent extremism" in universities and higher education colleges; see section 3 and Annex A. The difference is the more explicit recognition that the identified problems and grooming need not start with persuasion to violence but rather with settling a context or group of attitudes in which a violent response can more readily be proposed or seen as the logical outcome.

151. Mr Bowen finally submitted that the guidance should warn decision-makers of the risk that it would have a disproportionate impact on Muslims. That is not a matter of law. No claim is made that it leads to unlawful indirect discrimination. I regard it as obvious that one target of the guidance is Islamist terrorism, and preventing Muslim and non-Muslim people being drawn into it through non-violent Islamist extremism.

152. **Conclusion on Article 10**: I do not consider that the Court should decide whether the guidance documents are compatible with Article 10 in the absence of a particular set of circumstances, in which a host's or speaker's or potential speaker's rights have been interfered with and the justification can be measured against the facts. The possibility that, in the future, the Claimant's rights, or some other unidentified person's rights, could be interfered with, does not mean that this Claimant and this case become a proper avenue to pursue it. He has produced no evidence from any

RHEB as to why he has not been invited when previously he might have expected an invitation in the course of a year, let alone any evidence that the HEPDG, procedures, discussions with EAU or Prevent Duty co-ordinators, or fear of stigmatisation by possible hosts have had any effect.

153. I am also clear that, if so, that has been balanced with Article 10 rights in three ways. The guidance does not and cannot alter or override the duties on RHEBs in s26 and s31 CTSA, and s43 EA 1986. Second, the guidance as I have set out, may mean that the speaker faces, at the same meeting, views contrary to and challenging his own. This cannot be seen as an interference with the speaker's Article 10 rights – he has no right to an invitation or to specify how, on university premises, the format of the meeting should be conducted. It would be an odd form of interference with free speech in the area of politics or religion if it could not take place on a university campus in the form of reasoned public debate. Third, as I have pointed out, potential speakers unable to speak on campuses can communicate their views through all other media, and publicly at all other venues, including to students but not at RHEB premises where students should not have to find that extremist views, which may affect them, are promulgated where they seek to study in freedom. There is no sanction for the expression of such views. A risk assessment process has to be undertaken before any question of considering cancellation arises. Of course, the guidance is not addressed to academic freedom, but to external speakers.

154. It may be that, in a particular case, the language will be deemed too broad or insufficiently justified to warrant some particular interference. The types or forms of non-violent extremism which risk drawing people into terrorism are not clearly delineated. If left for discussion between RHEB and Prevent Duty co-ordinators it may be private and risk arbitrariness, although it will always be subject to the entitlement of the RHEB to give greater weight to its free speech duty than to the guidance.

155. However, although I can see that this last issue may not be closed off in another specific case, I am not prepared to hold the HEPDG unlawful in these proceedings by this Claimant on these facts. A different claim may lead to an interference where this issue could be resolved differently. But I hold, in this case, that there has been no interference with the Claimant's Article 10 rights and to the extent that there may have been, it was justified and proportionate.

156. **Parliamentary material:** Mr Bowen cited Parliamentary materials including a report of July 2016 by the Joint Parliamentary Committee on Human Rights, JCHR, on the Counter-Terrorism Bill, the House of Commons House Affairs Committee, HAC, September 2014 and the report to Parliament by David Anderson QC, the Independent Reviewer of Terrorism Legislation, and his evidence to the HAC and JCHR.

157. For this specific issue about the evidence that non-violent extremism can risk drawing people into terrorism, I do not need to resolve the debate about Article 9 of the Bill of Rights and the role of Parliamentary materials on issues of proportionality. All I need do at this stage is point to the content of the documents, taken at face value, in the passages relied on by Mr Bowen.

158. The JCHR in its report on the CTS Bill said that the Government's Counter-Extremism Strategy

> "…appears to be based on the assumption that there is an escalator that starts with religious conservatism and ends with support for Jihadism; and that combating religious conservatism is therefore the starting point in the quest to tackle violence. However, it is by no means proven or agreed that conservative religious views are, in and of themselves, an indicator of, or even correlated with, support for Jihadism."

159. But this, eschewing all commentary at the validity of what it is thought the Government appeared to assume, says no more than it is neither proven nor agreed that "conservative religious views" are "in and of themselves" an indicator of or correlated with support for Jihadism. True this is not evidence that non-violent extremism risks drawing people into terrorism but it is not contrary evidence.

160. The HAC in [11-19] considered the factors contributing to radicalisation:

> "11. Witnesses agreed that there does not appear to be any clear template for the factors which might lead to radicalisation. David Anderson described to us two possible contributory factors – grievances and ideals. The sources of grievances varied extensively but could include poor family relationships, bullying at school or within social groupings, and the UK's foreign policy. David Anderson explained that, once this negative viewpoint had set in, in some people radical ideology then "battens on to the grievance and makes sense of the grievance and that makes sense of the person's life".
>
> 12. Some other factors we have identified that may contribute to radicalisation include an element of brainwashing, and involvement in gang violence and low-level crime. Perceived grievances about UK foreign policy seem to relate particularly to matters involving Islamic countries. There may also be an issue for some young people around identity, and an inability for parents to pass on their views about the traditional practice of religion, or to enable their children to challenge beliefs, particularly where parents lack the necessary English-language skills."

161. The HAC heard differing views about the role of alienation of Muslims from British society. Some thought there was no problem and counter-extremist strategies which assumed there was risked reducing co-operation from Muslim communities. Others spoke of those brought up after 9/11 who were "viewed through the lens of counter-terrorism". "This group had listened to "hardening interpretations of religion", to stories about how the Government wanted to stop Muslims from practising their religion, and to views that living in the UK was a temporary measure. This led them to feel that they had to "choose between being British and being Muslim", in addition to the normal issues that teenagers have to deal with. This could then make it very attractive to some young people when an individual or organisation tells them that they can offer something much better. Older people were increasingly unable to pass values on to the younger generation, at the same time as young adolescents wanting to imitate what they saw in the media and become "heroes". Another, the sister of a man

who became a violent extremist, said she was unaware of "a specific trigger, rather it was a 'long transition period'".

162. The HAC concluded:

> "18. There is no evidence that shows a single path or one single event which draws a young person to the scourge of extremism: every case is different. Identifying people at risk of being radicalised and then attracted to extremist behaviour is very challenging. It also makes the task of countering extreme views complex and difficult. If the Government adopts a broad-brush approach, which fails to take account of the complexities, and of the gaps in existing knowledge and understanding of the factors contributing to radicalisation, that would be counter-productive and fuel the attraction of the extremist narrative rather than dampening it.
>
> 19. The Government must take a much more sophisticated approach both to identifying the factors which instigate radicalisation and in the measures it takes to tackle this. We recommend the Government work with a cross-section of academic institutions in the UK that work on radicalisation, to marshal existing intelligence and research and develop a more effective understanding of the factors leading to extremism. This should include speaking to the families of known extremists to draw on their experiences. Without such a solid foundation, the strategies in the proposed new Counter-Extremism and Safeguarding Bill are likely to approach the issues and entire communities in an unfocussed manner, and therefore ultimately to be ineffective."

163. The 2015 Report of David Anderson QC commented on the then proposed Counter-Terrorism Bill. He discussed what he describes as "notoriously difficult questions to answer: how much "extremism" exists and how important is it as a generator of terrorism or other harmful activity". He concluded [9.23] that his work could say little about the prevalence of extremism, and unlike violent extremism, the links between non-violent extremism and terrorism are less direct, and less obvious". Later [89], he refers to the dangers of more broad definitions, unintended targets, the risks of legitimising state scrutiny of "the exercise of core democratic freedoms by large numbers of law-abiding people".

164. Taken at face value, and without any agreement or disagreement, I appraise the material as being to a degree more supportive generally of the existence of a strand of radicalisation through non-violent extremism than to the contrary.

165. I have dealt with this material rather tentatively however and on this one point, though it was relied on quite extensively on a range of issues by the Claimant. Article 9 of the Bill of Rights 1689 provides: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

166. On 21 September 2016, the Speaker's Counsel wrote to the Claimant's solicitors expressing concern about their proposed reliance in this case on evidence presented to and conclusions of the JCHR. The SSHD had referred the use of Parliamentary materials to the Speaker's Counsel because of her concern that Article 9 was being infringed. He said that reliance on evidence given to a Select Committee or its recommendations was likely to breach Article 9. It appeared, he said, that reliance was being placed on the judgments of the JCHR and of Mr Anderson's evidence to the HAC: this reliance invited the court to agree or disagree with that evidence. He did not consider the material could be used to resolve issues of proportionality and distinguished that use from its use when compatibility with the ECHR was at stake, as in *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40, [2004] 1 AC 816. There was a distinction, as drawn by Stanley Burnton J in *Office of Government Commerce v Information Commissioners* [2008] EWHC 774 (Admin), between the use of Parliamentary materials as historical facts or events, and their use to support one party's case in litigation. If the issue might be contentious, the other party would be entitled to take issue with it, but the prohibition in Article 9 placed him at an unfair disadvantage. Discussion in correspondence ensued, but the Speaker's Counsel decided to make no submissions.

167. Mr Bowen submitted that the views of Mr Anderson in his 2014 Report had been treated as an interpretative aid in *Miranda*, above. It is true that, without objection or reference to Article 9, that Report was referred to in *Miranda*, but only to the extent that it illustrated examples of the unexpectedly extrusive scope of "terrorism" on one definition, examples which needed no report to support their postulation.

168. The most recent authority, which very helpfully summarises the earlier authorities, is *R (Collins) v Justice Secretary* [2016] EWHC 33 (Admin), [2016] QB 862. The so-called householder's defence in s76(5A) Criminal Justice and Immigration Act 2008 was challenged as incompatible with ECHR, Article 2. Mr Bowen for the Claimant in that case referred the Divisional Court to Parliamentary material, including the JCHR and speeches of members of the House of Lords.

169. In *Collins*, the Court, Sir Brian Leveson P and Cranston J, approved what Stanley Burnton J said in the *Office of Government Commerce* case above. The Court also set out with approval [48-49] of that judgment:

> "48. In my judgment, the irrelevance of an opinion expressed by a parliamentary select committee to an issue that falls to be determined by the courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.
>
> "49. However, it is also important to recognise the limitations of these principles. There is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no 'questioning' arises in such a case: see para 35 above. Similarly, it is of the essence of the judicial function that the courts should determine issues of law arising from legislation and delegated legislation. Thus, there can be no suggestion of a

> breach of parliamentary privilege if the courts decide that legislation is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms: by enacting the Human Rights Act 1998, Parliament has expressly authorised the court to determine questions of compatibility, even though a minister may have made a declaration under section 19 of his view that the measure in question is compatible."

170. The use of Parliamentary materials was not confined to compatibility issues but covered proportionality issues too. The mischief to which legislation was aimed could be relevant. Applying *Wilson v First County Trust Ltd (No. 2),* above, considering such material would not involve "questioning" proceedings in Parliament but merely the court placing itself in a better position to understand legislation. Sir Brian Leveson continued at [68-69] of the Office of Government Commerce:

> "68…. There is certainly no suggestion that a court should take as authority, or even look to the view of parliamentarians on whether legislation is compatible with the ECHR. Indeed, it is a specific consequence of the Human Rights Act 1998 that it is the responsibility of the court to decide whether legislation is compatible.
>
> 69 In any event, a court certainly cannot refer to parliamentary material to question its truth or accuracy: see Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, para 65, per Lord Nicholls, and the Office of Government Commerce case [2010] QB 98, para 47. Looking to the view of parliamentarians on whether legislation is compatible with the ECHR will inevitably lead the court into assessing the validity (and accuracy) of these views which is clearly forbidden territory…."

The Court then made no reference to the Parliamentary materials.

171. I have referred to some only to explore, without questioning, whether they contained "evidence" on a particular topic. I have read the contributions of the persons named by Mr Bowen to a debate in the House of Lords but consideration of them in this context seems to me to invite impermissible approbation, qualification, disagreement or comment on others whose contributions had been lauded by successive speakers. Any further use of the Parliamentary materials seems to me to fall foul of Article 9, and to create the risk that its use is unfair because it cannot be rebutted or criticised where it is against a party's case. It may be that I have gone too far anyway, but its absence would not alter my decision.

B: The collection, storage, use and disclosure of information on "extremists" by the Extremism Analysis Unit: did it breach Article 8 ECHR?

172. The challenge is clearly grounded in Article 8 and, although a claim for damages under the Data Protection Act 1998, DPA, is to be considered later, and provisions of

the DPA were relied on by Mr Bowen, that was for the purposes of advancing the Article 8 argument.

173. **The operation of the EAU:** I start with the operation of the EAU. The EAU is a unit within the Home Office as part of a larger group which has varied over time. Mr Bowen said that its existence was not "widely known"; that may or may not be so but it has not been a secret either. It was established in December 2014 and was already "up and running" in March 2015, when the then SSHD spoke of it publicly in a speech describing its functions in general terms. The Home Office refused an unconnected FOIA request for information about the work of the EAU in April 2015. The Home Office response to a Parliamentary Question on 7 September 2015 said: "The Extremism Analysis Unit (EAU) was established with a remit to analyse extremism in this country and abroad where it has a direct impact on the UK and/or UK interests. The EAU is a cross-government resource, with government departments able to commission research and analysis. The EAU and Home Office officials engage widely with partners across government, academia and, communities. The Unit currently has 14 staff and is intended to grow by a further 10. This is met out of existing budget. The Home Secretary is accountable to Parliament for the work of the EAU. The EAU does not blacklist individuals or organisations."

174. The Counter-Extremism Strategy of October 2015 referred to it in connection with the disruption of extremists, strengthening data sharing with UK overseas posts which would involve "particularly close collaboration" with the EAU. The EAU was described as a unit within the Home Office "to support all government departments and the wider public sector to understand wider extremism issues so they can deal with extremists appropriately." It would work closely with the Foreign Office and Department for International Development because extremism in the UK was often shaped by and connected to extremism elsewhere in the world "including the movement of individuals, ideology and funding."

175. Mr Willis, its head, summarised its functions in his witness statement:

> "2.6 In summary, the role of EAU is to help improve government's understanding of extremism and related trends, providing the Office for Counter-Extremism and other customer departments (see below) with expertise and advice to inform the implementation of the Counter-Extremism Strategy and wider counter-extremism work. Examples of this work include analysis of extremist ideologies and narratives to support campaign work and analysis of groups, networks and themes to inform policy formulation, e.g. the Review of the Funding of Extremism announced by the then Prime Minister on 30 November 2015."

176. He explained how it worked at [2.15]: "EAU conducts "all source" research for customers across government, using material from a wide range of sources such as other government departments, local authorities, Home Office data sources, and interviews with experts, e.g. academics, local community leaders and the police. EAU also accesses a wide range of publicly available "open source material" including academic articles, journals, news media, websites, blogs and social media."

177. Mr Willis described two kinds of research and analysis which the EAU casework team undertook. Its due diligence function was designed to identify any information relating to a given individual or organisation that could give rise to "reputational concerns related solely to extremism". This was to ensure that government does "not unknowingly engage with, fund or provide a platform for individuals or organisations that could pose reputational risks related to extremism." This relied predominantly on publicly available information but other sources were available if there was an exceptionally high level of exposure to reputational risk. There was also work to inform advice given by the Office of Security and Counter-Terrorism, OSCT, in relation to immigration cases. There were two other teams carrying out strategic analysis on a more in-depth basis, for example, in relation to organisations, networks or trends. Its research and analysis process usually started with a government body submitting a request or question through a number of channels. Mr Willis said that strategic level assessments had been prepared by the unit across a range of topics not previously well understood by government. The majority had focused on organisations and themes of Islamist extremism and extreme far-right concern. It has conducted sectoral analyses of universities, charities and on-line extremism. In a letter of 26 January 2016, the GLD said that the EAU did not "designate" individuals as "extremists" for others to investigate and had never produced or held a "list of extremists".

178. In carrying out its tasks, Mr Willis said that the EAU:

> "inevitably processes third party personal data because we are working to improve government's knowledge and understanding of a human phenomenon perpetrated by individuals. We inevitably operate confidentially because we process personal data relating to both non-extremists and extremists and our judgments are just that".

179. Mr Willis then explained that the EAU could not achieve its objects if it were unable to collect, record and retain information about individuals and organisations "who may or may not be associated with or involved in extremism". But there is a clear requirement that the EAU only recalls and retains information that allows it to meet its "business aims"; and it "will comply with the principles and requirements set out in the Data Protection Act 1998".

180. His evidence was that the EAU followed the principles of data protection set out in the Home Office Information Strategy of July 2012 and the Personal Information Charter updated in December 2015. This explained that personal information could be collected for reasons which included preventing crime, disorder and antisocial behaviour, and to keep Britain safe from terrorism. The data would be stored and processed in accordance with the DPA 1998 and other relevant legislation. Data could be disclosed to other organisations including other government departments and law enforcement agencies, foreign governments and other authorities including foreign law enforcement bodies. The Home Office had an annually renewed entry on the Information Commissioner's Data Protection Register. The EAU also had internal policies, disclosed in the course of this litigation, subject to redactions. These included a draft research policy, and information handling and sharing policies.

181. One of the forms which the EAU uses and did use in relation to Dr Butt was produced. This form includes information as to the nature of the research, the sources and tools to be used, why the information was necessary, what potential there was to interfere with an individual's right to privacy, including whether "it is likely repeated searches will be required or monitoring of an individual over an extended period with a view to building up a profile, etc.". Where this potential did arise, questions had to be answered about less invasive ways of achieving the desired results and whether there would be collateral intrusion on the privacy of those other than the subject of the research.

182. This form asked such questions as when it was considered that interference with privacy was likely, whether a named individual would be examined, whether information from different sources would be pulled together, whether information would be stored for a period of time, whether multiple searches would be conducted over time to build up a profile, whether it would include information about a private life and personal or professional relationships with others, whether several records would be analysed together to establish a pattern and whether other private information would be used to analyse the findings as a whole.

183. One annex, D, gave advice about the circumstances in which research might breach Article 8. It said:

> "Just because a piece of information posted on the internet may be "open source" (i.e. publicly available to view) it does not necessarily mean that the person who is the subject of that information has no expectation of privacy in relation to that information. Just viewing that information, even repeatedly, is unlikely to be an invasion of privacy. However, when a public authority is recording, storing and using open source information in order to build up a profile of a person or group of people (in circumstances where we could be seen to be "monitoring" that individual via the internet), there is potential for such activity to be viewed as an interference with individuals' privacy rights. In these circumstances processes should be followed to ensure that any interference is necessary and proportionate and that steps have been taken to minimise intrusion."

184. The draft EAU research policy was produced in May 2015 and finalised in November 2015; it was also discussed by EAU officials with the Office of the Surveillance Commissioners in January 2016, which, said Mr Willis, indicated that it was content with the policy. The principles were that research had to be for the purposes of protecting the public and ensuring equality, mindful that an individual's right to privacy could be interfered with, so the necessary approval would be obtained when required. The interference had to be necessary in order to help the government understand extremism; research had to use the least invasive means possible, recording and retaining the minimum amount of information required. The EAU had to be accountable, and so the information would be recorded in a way that made it clear what had been obtained and what it had been used for, and was easy to retrieve when required for lawful purposes.

185. Mr Willis said that the EAU's work might need to be covered by a Directed Surveillance Authority under the Regulation of Investigatory Powers Act 2000. But the EAU's work did not ordinarily involve extended monitoring over time and had not yet become directed surveillance requiring RIPA procedures to be followed. He estimated that about 1/3 of the EAU work was such that a material interference with privacy was considered likely.

186. The EAU's social media monitoring policy complemented the research policy. It was developed in July 2016. The fact that information may have been posted on the internet or be available on a public platform did not necessarily mean that an individual could not have an expectation of privacy in relation to that information.

187. The EAU's information handling policy set out its principles for information handling, taking account of the DPA 1998. It had three key classes of records: written assessments in the form of reports, records of overt meetings with "trusted members of the community", and a knowledge base which recorded information from a variety of sources. Mr Willis said that the written assessments were to be reviewed every six months and deleted unless there was a clear need to retain information; records of meetings are reviewed after two years as is the knowledge base. There was currently a moratorium across the whole of the Home Office preventing any data being deleted without ministerial permission. All EAU material is stored on the OSCT Net, a secure network. The material can be accessed by OSCT staff, all of whom will have undergone developed vetting. Some EAU material on the OSCT is only available to EAU staff as it is password protected.

188. The EAU information sharing policy involved the EAU providing what Mr Willis calls "its product" to "customers" across central government, devolved administrations, regulators, and the police. Although its policies envisaged the disclosure of finished product to international partners where there is a case for this, no process has yet been put in place and third party personal data is rarely, if ever, "disclosed outside the UK". Its "product" is not shared directly with local authorities or higher education institutions. Mr Willis said that some reporting was shared with local Prevent coordinators, who used the information to understand extremist issues better. The EAU may also flag events to Prevent coordinators so that they can raise issues with local authorities or higher education institutions. The higher education Prevent coordinators may use this to alert universities to events of potential extremism concern. There are handling instructions with the emails saying how the information is to be handled and used. It stressed its confidentiality. Information is not shared by the EAU with non-governmental or private sector organisations except in a handful of cases where they have been contracted to work on counter-extremism issues.

189. Although the analyses come from all sources, information is not shared by the EAU with those from whom it seeks information. This includes think tanks; one think tank – the Henry Jackson Society – was mentioned frequently by Mr Bowen, seemingly implying something sinister in its involvement not least as a private organisation. This independent British-based think tank has established an organisation called Student Rights in order to understand extremism on university campuses and to undertake related lobbying, according to Mr Willis. He explained that Student Rights had not been asked by the Home Office to undertake any of the work which they were in fact undertaking in providing information to the Home Office; and they received no money for doing so. The EAU had asked it if information they were receiving on an

ad hoc basis could be sent on a weekly basis. Mr Willis noted that the Claimant was named in one Student Rights Digest of October 2014. Student Rights does publish reports on campus extremism on their website.

190. Mr Bowen pointed to Mr Willis's description of the policies as not suitable for publication; they had been marked as official-sensitive but there have been redactions and they have been referred to in court. There may be further redactions to be made not relevant to the issues in the case, should any wider use be sought to be made of them. I will consider any submissions on further use outside court or redaction.

191. **Research into the Claimant**: Mr Willis explained the occasions on which the EAU had processed the Claimant's personal data. It had happened on three occasions. The first occasion was in February 2015 when the director general of OSCT asked the EAU if it could provide "a rough assessment of how many events had taken place on university campuses in 2014 involving individuals who had expressed extremist views. In the short time available the EAU largely relied on Student Rights information and reached a judgment as to whether this would meet the unit's threshold for individuals who had previously expressed views contrary to fundamental values and then verified the events independently where possible". Of the events noted, there were two at which the Claimant had spoken. This was an early piece of work for the EAU before any of its policies were in place. The analyst did not consider privacy issues at that stage of that work. But had the policy been in place, Mr Willis considered that he would not have concluded that privacy issues were "engaged" because he was not conducting repeated research into anyone over an extended period or creating a profile using information from a number of sources but utilising existing material. He was not researching any named individual either.

192. The second piece of research was by another EAU analyst in March 2015. This was a much more in-depth piece of research on extremism in universities in parts of London. The request again came from the director general of OSCT. It came in the context of the introduction of the PDG. Research was published in November 2015. The Claimant was not referred to in the published paper. The analyst sought the views and findings of Student Rights in around March 2015, receiving them in May 2015. She took this and the previous work of February 2015. An early draft of August 2015 included information about the Claimant. There was no separate consideration given to his privacy but no new information was obtained about him and he was not the subject of any further research. The paper was provided to No. 10 which was putting together a press release to coincide with the coming into force of the HEPDG.

193. A request had been made for case studies and the draft paper, and information from the draft paper was sent by someone within the Prevent Delivery Unit. This included six names, including the Claimant's. The EAU made it clear that the figure of 70 events on university campuses in 2014 involving speakers, known to be critical of core British values, could be used but nothing more specific. Unfortunately, the No. 10 and Home Office press offices issued the material without recognising the EAU's request as to how it should be used.

194. The EAU did not conduct its own research specifically on the Claimant until October 2015 after the press release. The request for the research is dated 14 October 2015. Information was sought to enable a response to be given by Ms Bradley MP in the

House of Commons to a Parliamentary Question asked by the Claimant's MP on 9 October 2015. The Claimant went to see his MP who said she would write to the Home Office and try and get answers as to how he had come to be labelled as an extremist. The MP asked the SSHD about the press release. She asked what evidence was used to identify the six "hate preachers" named in the press release, and if she would publish the evidence demonstrating that the Claimant had expressed views contrary to British values. The answer of 1 December 2015 to the Parliamentary Question was that the Home Office had information on 70 events at university campuses in 2014 where speakers had expressed views contrary to fundamental British values.

195. Mr Willis described the research done on this occasion. It consisted of a series of key word searches on Google using the name of the Claimant. This would have taken the analyst to other sites where his social media output could be seen along with material on Islam21C, the online publication he edits. The information in the profile came from Islam21C, Facebook and Twitter, including the Facebook and Twitter accounts of the Islamic Society at Goldsmiths, Imperial, and City Universities. It verified the material supplied by Students Rights, found some new material and ascertained further events at which the Claimant had spoken at universities. Part A of EAU form 1 was completed. The analyst did not consider privacy issues were engaged, as this was "a one-off piece of research and did not involve monitoring the Claimant over an extended period". This accorded with the research policy and took account of annex D factors.

196. The Claimant made a subject access request on 11 December 2015 which yielded the research itself under section 7 of the DPA 1998. It is described on EAU form 1 as "research undertaken into six individuals named in No. 10 press release on extremism at university campuses, including social media accounts (Facebook, Twitter, YouTube), blog and media posts in order to assess any extremist links or views". It was completed in a fortnight; the sources to be used were open source information and Home Office databases. Social media would be used. The proposal was necessary "to check whether the subject has any links to extremism or extremist views to produce a speaker profile and inform a submission on correspondence related to the No. 10 press release on extremist speakers at universities." There was no potential, it was said, for the research to interfere with his right to privacy but there could be if speaker profiles needed to be routinely updated. The activity was proportionate to what it sought to achieve and potential for collateral intrusion had been considered.

197. The relevant extract about the Claimant, from material provided by Student Rights in its paper on Islamist extremist events at selected London universities 2014-2015, referred to two events: one at City University and the other at London Southbank University, both organised by those institutions' Islamic Societies. This information had been derived from the Facebook of various university Islamic Societies. The notes on the City University event said that he was the chief editor of Islam21C, which was part of a wider network.

> "He has equated homosexuality with paedophilia and defended gender segregation as well as claiming criticism of segregation and FGM is an attack on Islam. In online posts he has also celebrated the kidnapping of Israeli soldiers and referred to Israelis as "pigs"."

198. The talk at London Southbank University of March 2015 was entitled "Why Islam?" No further information was provided. Also sent to the Claimant were extracts from a spreadsheet of an analysis of university extremists, which made reference to an event at Imperial College, a freshers' welcome dinner, where the topic of his address was unknown. A speech on 27 November 2014 at City University entitled "Sowing the Seeds of Success" covered a variety of topics, religious, jurisprudential, exegetical and historical.

199. The internal submission, having referred to the fact of two Parliamentary questions in which the government had been asked to provide evidence to support the claim that Dr Butt was an extremist and had expressed views contrary to British values, then said this:

> "Dr Butt
>
> Dr Butt is not amongst the most prolific speakers and does not routinely expound views in public that could be considered contrary to British values. Nonetheless, having reviewed the evidence, we are satisfied in the overall judgement that Dr Butt has actively and vocally opposed fundamental British values, as set out in the government's definition of extremism.
>
> • Dr Butt is the chief editor of Islam21c, a publication that has hosted material contrary to British values. We judge this constitutes actively condoning such views.
>
> • He has himself expressed views contrary to fundamental British values in this publication and on social media, appearing to compare homosexuals to paedophiles and supporting FGM.
>
> • On one of four occasions he spoke at universities in 2014, he appeared alongside CAGE and has used social media to support CAGE's position on Mohammed Emwazi ('Jihadi John'), which has been to try to justify Emwazi's resort to violence."

200. This was followed by four key judgments:

i) the Claimant was the chief editor of Islam21C, which has hosted material contrary to British values;

ii) he has expressed views opposed to British values on Islam21c and social media, comparing homosexuals to paedophiles and supporting FGM;

iii) "he is associated with a network of concerning Salafi speakers"; and

iv) he had appeared alongside CAGE and it repeated what they said about supporting CAGE's position on Jihadi John.

201. He had limited followers on Twitter and Facebook but Islam21C had a Facebook account with a significant number of likes and a Twitter profile with 23,000 followers. It repeated the comment that the Claimant was the chief editor of

Islam21C, which had hosted extreme material under the government definition of extremism. There followed some social media pages for meetings of the sort which I have already referred to. He regarded sodomy as a sin and that trying to justify homosexual desire was worse than the act itself. The article in question did not, however, explicitly promote hatred or violence. He implied that there was an acceptable form of FGM distinguishing between circumcision and mutilation and that a mild nick was in accordance with Sunnah. He was critical of what he saw as a lack of nuance in the attack on CAGE "for just talking facts about so-called Jihadi John". Other posts evidence what he had said about Israeli soldiers. There are also references to the EAU in the October 2015 "Counter-Extremism Strategy" published by the government. It is referred to in connection with various aspects of the government's policy for understanding the nature of an individual's involvement in extremism.

202. The answer of 1 December 2015 to the Parliamentary Question was that the Home Office had information on 70 events at university campuses in 2014 where speakers had expressed views contrary to fundamental British Values. The Claimant was described in the answer as the chief editor of Islam21C, a publication "that hosts material contrary to British values" and has himself expressed views of concern in this publication and on social media, appearing to compare homosexuality to paedophilia as a sin, and supporting FGM. He has spoken alongside CAGE and used social media to support CAGE's position on Mohammed Emwazi ("Jihadi John") which has been to try to justify his resort to violence.

203. **The Article 8 ECHR issues:** Article 8 ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety… for the prevention of disorder or crime… or for the protection of the rights and freedoms of others."

204. That gives rise to the following questions:

i) Was the right in Article 8(1) interfered with?

ii) If so, was the interference in accordance with law?

iii) Did the interference pursue a legitimate aim, as set out in Article 8(2)?

iv) Was the interference necessary and proportionate to that aim?

205. **Interference with the Claimant's Article 8(1) rights:** I turn to the first issue, which is whether the Claimant's Article 8(1) rights were interfered with at all. Most of the debate in this first issue revolved around the significance of the fact the Claimant's activities, as examined and researched by the Defendant were in public.

206. The most recent cases to examine the right to privacy in respect of what a person does in public are *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065, of 4 March 2015, and *In re JR 38* [2015] UKSC 42, [2015] 3 WLR 155 of 1 July 2015. Lord Toulson was the only SCJ common to both Panels.

207. The first case involved a "domestic extremism" database initially maintained by ACPO. The information about Mr Catt was a single photograph, subsequently destroyed, and written references to him on a number of "information reports" about other named people. They mostly recorded the fact of his presence at a protest, his date of birth and address, and some described his appearance as well. The police regularly identified the participants in the public demonstrations which Mr Catt attended; some of the participants sought to further the aims of the group organising the demonstrations, against a commercial arms manufacturer, by violent means or other criminal activity, but Mr Catt had never been involved in that.

208. Lord Sumption said that a particular feature of the data in question was that it consisted entirely of records made of acts of the individuals in question which took place in public or in the common spaces of a block of flats to which other tenants had access. None had been obtained by an intrusive technique.

209. "Private life" for the purposes of Article 8 had come to mean in domestic jurisprudence those parts of a person's life "where there was a reasonable expectation of privacy in the relevant respect". This extended beyond the privacy of the home or personal communications. He continued at [4]:

> "It must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."

After referring to other cases, he said at [6]:

> "These cases, and others like them, all have particular features which differentiate them both from each other and from the present cases. But it is clear that the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life. For that reason I think that the Court of Appeal was right to hold (overruling the Divisional Court in *Catt*) that article 8.1 was engaged."

210. *In re JR 38* did not purport to differ from *Catt*; the publication of a photograph of a child committing a crime, not long after the offence, did not interfere with his private life since he had no reasonable expectation of privacy in the act of committing a

crime. It also referred to the consistent jurisprudence of the ECtHR that the degree of interference had to reach a certain level of seriousness to constitute interference such as to bring Article 8(2) into play.

211. Mr Sanders drew attention to a recent decision of the ECtHR, *Magyar Helsinki Bizottsag v Hungary* (App 18030/11) of 8 November 2016, a Grand Chamber judgment. His purpose was to show that what Lord Sumption said at [6] of *Catt*, should not be regarded as an absolute statement without qualification in other circumstances. The Applicant NGO, concerned about the quality of state-appointed defence counsel, sought information on how often defence counsel by name had been appointed to act, creating a risk of dependency on the state for their livelihoods. The state refused to supply this on the grounds, among others, that it was private data. The ECtHR said [193-196]:

> "193. …Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment (see P.G. and J.H. v. the United Kingdom, no. 44787/98, § 57, ECHR 2001-IX).
>
> 194. In the present case, the information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders' professional activities cannot be considered to be a private matter. Moreover, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representative or consultations with their clients. The Government have not demonstrated that disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of the right to respect for private life within the meaning of Article 8 of the Convention.
>
> 195. The Court also finds that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders (compare and contrast *Peck v the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). There is no reason to assume that information about the names of public defenders and their appointments could not be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings, although it is clear that it was not collated at the moment of the survey.

> 196. Against this background, the interests invoked by the Government with reference to Article 8 of the Convention are not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the applicant NGO's right as protected by paragraph 1 of Article 10."

212. It concluded at [198] that the privacy rights of the public defenders would not have been "negatively affected" had the information been supplied to the NGO. "Although the information request admittedly concerned personal data, it did not involve information outside the public domain."

213. Mr Sanders also referred to *Krone-Verlag GMBH v Austria* (2003) 36 EHRR 57. The applicant newspaper publisher published a photograph of an Austrian politician, in connection with an article it wrote attacking him for enjoying three salaries in different political capacities. The Austrian Courts injuncted the newspaper from publishing the photograph on the grounds that it added nothing to the story. But the ECtHR said that that breached Article 10. It commented that what mattered was "whether this person has entered the public arena." It gave examples, which included politicians, but also persons participating in a public debate, and associations active in a field of public concern, on which it enters into public discussion. The photograph disclosed no details of his private life, and his picture was also available on the Austrian Parliament's internet site. Mr Bowen submitted that this was about Article 10 and not Article 8.

214. Mr Bowen submitted that *Catt* was decisive in his favour. There had been, as in *Catt*, a process of systematic collection of public information about the Claimant: the researcher had examined a named individual, information had been gathered from various sources, which had been stored for a period of time; the records were analysed together to establish a pattern of behaviour or to draw conclusions about the Claimant, and Home Office databases, which were not open, were also consulted.

215. These factors also showed that the right under Article 8(1) had been interfered with, applying the approach to privacy in the EAU's own policy on privacy and research, and the terms of the Code of Practice "Covert Surveillance and Property Interference" produced by the SSHD in December 2014 under s71 of the Regulation of Investigatory Powers Act 2000, RIPA. This referred to privacy issues being likely to arise in respect of activities carried out in public where several records were analysed together to establish a pattern of behaviour, or if information, public or not, are covertly obtained, (or sometimes overtly), was obtained to make a permanent record about a person or for subsequent processing to generate further information. The totality might be private even if individual parts were not. Whenever the internet was to be used as part of an investigation, the effect on Article 8 rights, including the effect of any collateral intrusion needed to be considered; if likely to interfere with Article 8 rights, it should only be used when necessary and proportionate to meet the objectives of a specific case.

216. Mr Bowen accepted that the Claimant might have no expectation of privacy in relation to observation of his public appearances or the viewing of his published articles, but submitted that he retained a reasonable expectation of privacy in relation to the state's collection, storage, retention and disclosure of "sensitive personal

information about him, which includes expressions of religious belief and political opinion." There was nothing perverse about requiring that to be justified. There was a real difference between Mr Sanders' example of a government database of actors' films and prizes, and the EAU, unknown to the subjects, systematically investigating and collecting public statements from news websites, twitter feeds and so on, for the purpose assessing whether someone was an "extremist", and sharing that information and assessment with others. The Claimant had not been told that he was being researched or that certain actions would lead to information about him being researched for the purposes of the PDG.

217. Once the EAU or Home Office started collecting data to see if an individual was an extremist, to build a profile of them, which he described as investigating individuals with a pejorative label, that of itself gave rise to a reasonable expectation of privacy. The distinction between multiple searches and single searches was misguided since a single search could cover a multitude of sites. The process could have potentially serious consequences; it could be shared, and it was used for the press release. The fact that the EAU says that that particular use was a mistake, did not alter the fact that it was a use of the data collected. It was not suggested that any of the activities of the Claimant were unlawful. No inference of consent to the processing of the data could be drawn from the fact that the data relied on was placed in the public domain, in view of the purpose for which it was collected: assessing whether his political or religious views were "extremist". Part was collected by a private body without safeguards for sharing. The use of the Home Office database meant that it was not just a search of publicly available data. The reference to association with network of concerning Salafists was private information.

218. Mr Sanders submitted that *Catt* was to be distinguished from the present facts. It did not decide that all recording and storage of public information about an individual necessarily interfered with Article 8(1) rights. Here, there had been no first-hand, immediate or contemporaneous recording of the Claimant or his activities or statements; the information was researched from pre-existing records produced by the Claimant and others, such as university Islamic Societies, and then recorded and analysed. The EAU had no executive powers unlike the police.

219. Although the work of the EAU could involve an interference with Article 8(1) rights, it had not done so here. There had not been, contrary to Mr Bowen's assertion, multiple searches over time on the Claimant so as to build up a picture of him, no private or family or business life information had been researched. The research had not been put together with other private information. That could be seen from the disclosure, in response to the subject access request, of all the material held by the EAU. There was no "other private information" pieced together with the results of the EAU's research. The EAU files on OSCT Net were searched and no information on the Claimant was found there. The reference to the Home Office databases was a reference to the OSCT Net on which all EAU files were held, as Mr Willis explained. But Mr Sanders could not say categorically that the search did not extend beyond EAU files on the OSCT Net.

220. The records here related to the Claimant's public statements which, as a letter before claim and his evidence said, were the work of an individual engaged in debate, discussion, and trying to involve others in debate; the purpose of Islam 21C was to engage in talk about politics, Muslim issues in open debate and dialogue; its main

focus was discussion about current affairs but it also engaged in religious dialogue and spiritual reminders. The relevant information was not within the scope of Article 8, and so its acquisition and retention could not bring it within the scope of Article 8. If the Claimant were right, no RHEB, researching his speeches and publications, could download and retain copies of his lectures or of Islam21C articles, or of blog-posts or tweets, without interfering with the Claimant's Article 8(1) rights, requiring an Article 8(2) justification. Nor could the EAU research public statements on news websites, blogs twitter feeds and the like. The original research was done, not for labelling people, but for the purposes of the s26 duty, and checking what Student Rights had provided to the EAU. Profiles would be used to flag events.

221. In reality, submitted Mr Sanders, the complaint was of the assessment made by the researcher using the information; that did not of itself interfere with Article 8(1) rights. Mr Bowen submitted that the "key judgment" was not already in the public domain, and carried with it "the stigma of suspicion." It differed from the position described in [27] of *Catt*, where there was no judgment that Mr Catt himself was an "extremist", and the data merely recorded attendance at demonstrations without allegation of illegal activity on his part, and was not disclosable other than for police purposes or on a subject access request. It was not used for political purposes or for victimisation of dissidents, nor was it available to potential employers or outside interests. Mr Bowen contrasted that with the position here.

222. **Conclusion on interference:** I am persuaded that the EAU did not interfere with the Claimant's Article 8(1) rights, or at least did not do so at the level required to constitute an interference for those purposes.

223. *Catt* held that the systematic collection and storage of information in a retrievable form obtained in a public place about a person interfered with their private life. It appears to have been accepted that Mr Catt had no reasonable expectation of privacy while attending the demonstrations but he had a reasonable expectation of privacy in relation to the state's systematic collection and retention for a considerable period of material gathered while he was at the demonstrations. The decision in *Catt* binds me, even if the decision of the ECtHR in *Magyar Helsinki Bizottsag* might have caused the Supreme Court to qualify what it said.

224. I do not think however that *Catt* is decisive, contrary to Mr Bowen's submission, in relation to the sort of public statements by a person engaged in public debate which are involved here, which went considerably beyond Mr Catt's attendance at demonstrations in terms of how much was placed by the individual in the public domain and therefore represented his public not private life, and involved no known collection of data other than from publicly available sources. I recognise that Mr Willis cannot categorically say that that was the case, but I see no reason to infer that it was. The "HO files" accepted to have been searched were the EAU files on the OCTS Net. There is no evidence from any of the output that any non-public source was searched.

225. *Catt* must be read with *In re JR 38*. The Supreme Court, Lord Toulson, [86], approved what Laws LJ said in *R (Wood) v Comr of Police of the Metropolis* [2010] 1 WLR 123 at [21-22]: Article 8 applied to "…an individual's personal autonomy makes him …master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image…and also of 'the zone of

interaction'…between himself and others…" But this core right, "however protean, should not be read so widely that its claims are unreal and unreasonable." He identified three safeguards: the interference had to attain "a certain level of seriousness;" there had to be on the facts a "reasonable expectation of privacy"; and there were justifications which could permit interference.

226. Lord Toulson saw *Catt* as turning on whether Mr Catt enjoyed a reasonable expectation of privacy. Here, the Claimant seeks to engage in public debate about issues of political, religious and moral controversy. He edits a website which seeks to do just that, and he contributes to it. He wants to go to RHEBs so as to make his views known, and to stimulate debate or advance agreement with his views. The views he expresses are not private views but his public views, which he wishes to promote in public. That applies to his blogs and tweets. While for certain purposes, a person's religious or political views may be "sensitive personal information", they are not properly so described for a person who makes them public of his own volition for the purposes of persuading others to them. Indeed, as Mr Sanders rightly pointed out, the previous ground concerns his rights under Article 10 to do just that. I find it very difficult to reconcile arguments which say that he is entitled to make his views known, but also entitled to treat collection of data and research into those public views as disrespecting his private life. The expectation of privacy is quite different from what Mr Catt might expect from his attendance at public demonstrations, at which members of the public could identify him as supporting the organisation's stance.

227. While the mere fact that an act takes place in public does not of itself mean that there can be no reasonable expectation of privacy about it, that cannot sensibly be so where the act is deliberately in the public domain for the public to see or read or hear it. A politician might reasonably expect privacy for political comments made to a friend in a private conversation in the street, or for the contents of his shopping bag, but could not do so for media interviews and public speeches or invitations. He can have no reasonable expectation of privacy to the effect that they will not be collected and analysed by any who wish to do so.

228. The data researched on all three occasions was what the Claimant himself had placed into the public domain, or was directly related to his activities in the public domain in so far as it consisted of the Facebook pages of Islamic Societies which had invited him to speak. The Claimant has seen the whole of what was researched. Nothing of that related to any other aspect of his life, private, family, friends or business. The Twitter account comments included the photograph which the Claimant himself used for the account. There was no other photograph or description of his appearance. This was very recent information.

229. I accept that the EAU operates covertly in the sense that the existence and purpose of the EAU was not widely known and its activities were not notified to the subject of the research. I also accept that the data collected in the course of research is not, at least at present, deleted, and may be kept indefinitely. Student Rights was a private source.

230. It is very difficult to see, however, how this differs from the activities of press officers of public authorities, or others employed by public authorities who need to know what an individual has published or stated for public consumption. This is the public

material of someone who has consciously entered the public arena. This is not a covert, or even overt, recording of what someone has said or done in public in circumstances to which any reasonable expectation of privacy could attach. There has been no lapse of time of such a length that someone could reasonably have said that that was in the past and should not be brought up. I see no real difference between this and, for example, a searchable database maintained by a university of the speeches and papers delivered by external speakers on its campus, or the inclusion in the database of the speakers' responses to Facebook comments (except that that would clearly be systematic), or even collecting and analysing of the speeches and publications of a potential speaker, or the EAU downloading a copy of a book which discusses the views of the Claimant and others, or named Salafists.

231. I agree with Mr Sanders that Mr Bowen mischaracterises what the EAU did as "multiple searches on the Claimant over a period of time to build up a profile", nor did it piece the research together with other private information. And it did not include information about his private, family, friends or business or professional contacts.

232. But if *Catt* does cover the state's systematic collection, through publicly available sources, of the views expressed by a person in the course of or for the purposes of public debate, and the storage and retention in retrievable form of that data, I cannot see that what happened here involved the systematic collection, storage and retention in retrievable form, of those views.

233. There has been no systematic collecting of private data or of data in the form of the Claimant's public views. The EAU did not create any first-hand record of what the Claimant said. The first point at which his data was "processed" was in February 2015. "Processing" data for the purposes of the Data Protection Act, means obtaining, recording or holding information or data or carrying out any operation on it including retrieval, consultation, use or disclosure. Of itself, processing data involves no necessary interference with Article 8(1) rights. This was research which took the course of an afternoon. The EAU was asked to provide a rough assessment of how many events had taken place on university campuses in 2014 involving individuals who had expressed extremist views. The weekly bulletins from Student Rights were considered. This showed two events at which the Claimant spoke. The collection of the bulletins cannot constitute systematic collection of the Claimant's data, though the bulletins are retained and are retrievable.

234. The second occasion was in May 2015 when as a result of the EAU being asked to look at extremism in universities in more detail, the researcher spoke to Student Rights who sent her a paper based on their research. Some of this was used with the earlier paper, and other work to produce a paper in November 2015 "Extremism in Universities: A Case Study of East and South East London." This did not refer to the Claimant, but the reference to him from the earlier bulletins was again read in the course of preparing the November paper. I am not in the slightest surprised that it did not occur to the researcher that the Claimant's rights were being interfered with. Neither this occasion on its own or with the earlier one could there be acts which merited the description of systematic collection and storage of the Claimant's data though what there was would have been retrievable. This was no more than a repeat of the one-off occurrence in which his name had cropped up.

235. The third occasion was in October 2015 when Mr Willis accepts that there was research by the EAU specifically in relation the Claimant. This was a one-off piece of research, using key word searches on Google. This took the researcher to social media sites, Facebook and Twitter, to review his social media output, and to Islam21C, to review the material on its site. It also led to the Facebook and Twitter accounts of the Islamic Societies at three universities. The purpose of the research was to produce a profile for the purposes of a submission to Ministers on the press release, and was used to answer the Parliamentary Question which the Claimant's MP asked, in order to assist him in his understanding of how and on what basis he came to be named as an "extremist" in the press release.

236. I will assume that the output of the research has still been kept and is retrievable. But, neither on its own or with the earlier researches is this the systematic collection, retention or processing of his data. Moreover, it was done in response to the need to answer the Parliamentary Question, and the Claimant must have expected that some research would be done. I find it impossible to see that research done for that purpose, and retained in retrievable form, of some of his public statements and of some advertised events he attended at universities, can constitute an interference with his Article 8 rights.

237. Mr Sanders is also right that making the judgment that the Claimant was an "extremist", right or wrong, and to which he strongly objects, and passing it to Ministers is not an interference with his Article 8 rights. I am prepared to assume that the judgment was passed to Prevent Co-ordinators, and would be used by them in discussion with RHEBs should the Claimant accept an invitation as an external speaker to a university campus. That has not happened yet. A private discussion of publicly expressed views does not involve any interference with his Article 8 rights.

238. **If there were an interference with the Claimant's Article 8(1) rights, was it in accordance with the law?** Although I do not consider that his rights were interfered with, I nonetheless consider that I should deal with the issues which would arise if they were. It was not at issue, before me at any rate, that the SSHD had power at common law or under the Royal Prerogative to obtain, record, analyse and disclose information. It is also not disputed that the absence of a statutory power does not mean that the actions are not in accordance with the law. For these purposes, the exercise of the powers must be governed by clear and accessible rules of law, governing the scope and application of measures, as well as minimum safeguards concerning duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction. As Lord Sumption put it in *Catt* at [11] "For this purpose, the rules need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them. Their application, including the manner in which any discretion will be exercised, should be reasonably predictable, if necessary with the assistance of expert advice. But except perhaps in the simplest cases, this does not mean that the law has to codify the answers to every possible issue which may arise. It is enough that it lays down principles which are capable of being predictably applied to any situation."

239. The exercise of such powers is regulated by the Data Protection Act 1998, described in *Catt*, [8], as the "principal element" of "an intensive regime of statutory and

administrative regulation," and in [12] as "a comprehensive code responding to the requirements of the EU Directive and the Convention".

240. S4(4) DPA requires the data controller to comply with the data protection principles set out in Schedule 1.

241. Those obligations are supported by the EAU's internal policies, not disclosed before this hearing, but nonetheless applicable. I have referred to the EAU's draft Research policy's approach to privacy. They are also supported by the Home Office Information Strategy and its Personal Information Charter, albeit that they do not refer to the EAU or extremism or to the sort of work it does. The latter refers in general to the circumstances in which data is collected and how an individual can find out about data held on them. The Home Office Data Protection Entry on the Information Commissioner's Register says that it does analyse information to protect citizens from terrorism and allied but more general purposes. It explains who the information is processed about, and who it may be shared with.

242. Mr Bowen contended that the framework of law was inadequate here because the Claimant, whose information was obtained, was not notified of that fact by the EAU, nor was he given an opportunity to refute the allegation that he was an "extremist". The functions, powers and governance of the EAU were not published. The EAU's data protection policies were not publicly accessible; indeed Mr Willis made the case in his witness statement for keeping them, though redacted of certain details, as confidential, even though a Code had been published for the purposes of RIPA. Its functions of investigating extremism were so broad and untrammelled by criteria that they could cover lawful activities by many thousands of people. Judgments were made on the basis of the research, which were not in the public domain. Searches went beyond open sources. The data was shared with other public bodies.

243. Even if it were permissible for such policies to exist "below the waterline" as held by the Investigatory Powers Tribunal in for example *Liberty v GCHQ* [2014] UKIPTrib 13-77H at [41], they needed to be known publicly to exist, with their content sufficiently signposted so as to give an adequate indication of it, and they needed to be subject to proper oversight. Those requirements were not met; there was no external oversight of the EAU, and the OSC could not approve the research policy in a formal sense. The OSC had no oversight of the operations of the EAU.

244. In my judgment, the powers were exercised in accordance with the law. The DPA is adequately clear for that purpose. There is no inevitable requirement for further Codes in order for data processing controlled by a data controller to be conducted within a clear and accessible legal framework. The Home Office Code, Charter and IPC Register entry do not add a great deal, but are of assistance in relation to what the Home Office does and how to find out about it, although they do not mention extremism, the EAU or the Prevent duty. The breadth of the language makes it at least very probable to a reasonable reader that they do cover those topics.

245. I do not regard the EAU's own Codes as part of the framework of law as they were not disclosed or their content signposted before the relevant actions here. Their content shows that if considered and followed they would be a sound basis for saying that the actions were lawful; although Mr Bowen made a number of criticisms of

them, he did not suggest that following them would have led the processor to breach the DPA or Article 8. But they are not part of the legal framework.

246. I do not accept Mr Bowen's submission that the data processing was unlawful because the Claimant was not given the chance to respond to the judgment that he was an "extremist". There is no requirement, in order for the law governing the processing to be clear and accessible, nor is it a requirement of any applicable law, that any judgment made on the processed data should be disclosed to the data subject. It may be desirable in certain circumstances for other reasons but it involves no absence of the necessary law, or breach of it.

247. I do not accept either his other submission that the law required the Claimant to be notified on any of the three occasions when his data was processed that that was happening. Quite apart from any considerations of confidentiality or of the undesirability of letting any given individual know that his activities are being researched, I accept Mr Sanders' proposition that notification would be impracticable to a data subject on every occasion the name cropped up in the sort of research done by the EAU, or other data processing public authority, or the work led to a more specific check. Besides, the Claimant did know by the time of the October research that his data was being processed; and the Parliamentary Question which he wanted asked, had led to it. Once he knew that the information would be obtained and passed on as it was, he had no and certainly no reasonable expectation of privacy in relation to that; this was comparable to the processing of data of foreign patients treated on the NHS who were warned in advance that a failure to pay the fees due would lead to the Home Office being informed which could use it in controlling applications for leave to enter or remain; *R (W) v Secretary of State for Health* [2015] EWCA Civ 1034, [2015] 1 WLR 698, at [44].

248. Mr Bowen said that the first data protection principle in DPA Schedule 1 had been breached, in relation to the Claimant, because he had not been notified of the processing of his data as required by the interpretation in Part II of Schedule 1 of "fairness" in Part 1 of Schedule 1. There are qualifications to that requirement. He was not seeking a ruling on that matter, but relied on it however to show that the DPA remedies were ineffective: absent notification, Compliance with the first data protection principle was relevant to the existence of a reasonable expectation of privacy.

249. He accepted that here Dr Butt had exercised a remedy, and had made a subject access request on 11 December 2015. A s10 notice to stop the processing was refused by the SSHD. For the purposes of the first principle, the identity of the data controller as the Home Office was readily available to the Claimant; the EAU was not a data controller. The purposes for which the data was to be processed was readily deducible from the PDG and HEPDG, and Counter-Terrorism Strategy. It is difficult to see what other information was required to make the processing of the data fair, in view of what data was being processed. The Claimant had the knowledge needed to make a subject access request; and he could then pursue what remedies he had directly under the DPA.

250. Mr Sanders submitted that in the light of the duty in s26 and the PDG and HEPDG, it was quite unnecessary for the Claimant personally to have been told that information about him would be processed. It was obvious that the Home Office would be

processing information about violent and non-violent extremists. The October 2015 Counter-Extremism Strategy made perfectly clear that non-violent extremists were regarded as harmful to society through the justification of violence, promotion of hatred and division, the encouragement of isolation, alternative systems of law, rejection of democracy, and harmful and illegal cultural practices. In my view, although the Claimant may not have seen himself in that light, he readily could have contemplated that others might in the light of the PDG, and made a subject access request. The timings did not work out that way but the DPA protection was adequate without specific notification.

251. Mr Bowen also took me to the Information Commissioner's Personal Information Online Code of Practice and her "Code of Practice on Privacy Notices: communicating privacy information to individuals." He contended that this showed that there was a duty to notify: the information was sensitive, its intended use "unexpected or objectionable", providing the information would have a significant effect on an individual, and it could be shared with another organisation in a way which the individual would not expect. Mr Sanders submitted that notification would have been disproportionate, and an adequate alert was given on the Home Office website. If there were a real complaint about the DPA, that was for the Information Commissioner. I do not think that Mr Bowen's contention advanced his argument on this aspect.

252. **Was any interference in pursuit of a legitimate aim?** The purpose of the actions of the EAU which led to any interference, such as it was, was to support the duty in s26 and the PDG and HEPDG, and the Counter-Terrorism Strategy. The purpose of the third interference was also to answer the Parliamentary Question. Parliament has accepted that there is a relationship between non-violent extremism and the risk of being drawn into terrorism. Research into and identification of those who are or may be non-violent extremists, and in what way, and whether or not they seek to engage with young people in debate, helps identify the degree of risk which each may pose and control it. It thus enables a more informed assessment of the risks to be made, for action to be taken on that assessment appropriately. This serves the purposes in Article 8(2) of preventing disorder or crime, and protecting the rights and freedoms of others. It may serve other Article 8(2) purposes as well. I have considered these points in the context of the challenge to the PDG and HEPDG under Article 10. Mr Bowen's Skeleton Argument said that the use to which the information was put "can be described" as use for the suppression of political and religious dissent. That was not his actual submission. Much "can be described" in ways which seriously misrepresent their aim and effect. But if it does not mean that it is so used, the point has no significance.

253. **Was the interference proportionate to the legitimate aim pursued?** Mr Bowen submitted that this was not the sort of information which people would expect a government to collect and retain, particularly as the EAU received information from the Henry Jackson Society's Student Rights. The scope of the EAU work was too ill-defined and broad; the definition of "extremist" was equally broad, and so the assessment that someone fell into that category was very uncertain. The EAU policies contained no provision for automatic review for case assessment which would be retained so long as relevant to research needs. Where there was provision for automatic review, the basis for deletion was vague; and no personal data had ever

been deleted. The "product" of EAU research could be shared in ill-defined circumstances with other government departments. The relationship between what the Prevent co-ordinator could have disclosed to him, and what he could discuss with RHEBs was unclear.

254. I disagree. This case is not concerned with the lawfulness of the EAU's policies as such, nor with what could happen to others, who then might have a remedy under the DPA. This case is about this Claimant. If the aim is legitimate, then the interference by the research was proportionate to the aim. The retention of the data is proportionate; it may continue to be needed for research and to inform guidance to the RHEBs. The data is not shared with RHEBs or other public or private bodies, but even if the precise relationship between the information retained and what the Prevent co-ordinator describes to the RHEB is unclear, the fact that it is used in that way does not show the interference to be disproportionate, but rather that it is being used for the legitimate purpose for which it was collected. The absence of clear deletion provisions does not make it disproportionate yet, since there is no reason why in the Claimant's case, if legitimately collected, the data should have been deleted. The fact that some of the data comes from a private body's information about public meetings or social media posts by the Claimant does not bear on the issue.

255. I accordingly reject this challenge under Article 8 to the collection, storage, retention and use of the data.

C: Was the collection and storage of information about the Claimant directed surveillance under RIPA?

256. The Claimant applied for permission to argue this ground, which the Defendant opposed. The relief sought is a declaration that processing the Claimant's personal information was unlawful because it was unauthorised "directed surveillance" for the purpose of s26 RIPA. This was therefore a further reason why the interference with Article 8 rights was not in accordance with the law. Mr Sanders disagreed: the RIPA ground added nothing to that contention because whether Article 8 rights were interfered with and whether an RIPA directed surveillance authority was required turned on substantially the same legal issues and the same evidence. And the SSHD had filed evidence from Mr Willis explaining the test applied in determining whether an RIPA directed surveillance authority was necessary.

257. At a directions hearing on 30 November 2016, I ordered that the application for permission be considered on a rolled up basis at the substantive hearing of the other issues. But in view of the SSHD's concern about the evidence she would need to adduce, I also said that the court would not determine the substance of the ground if I judged that that would deprive either party of a fair and reasonable opportunity to file and serve further written evidence dealing with the RIPA ground. The SSHD was to file a note outlining the further evidence she required by 3 December 2016.

258. In the event, Mr Sanders accepted that the RIPA ground did not require further evidence for its fair determination. He contended that the amendment was out of time because the SSHD's grounds and evidence contained no new information to support it. Mr Bowen submitted that after the disclosure of the Defendant's grounds and evidence in October 2016 it became clear that the EAU conducted "all source" investigations going beyond information already in the public domain and consulted

in the Claimant's case Home Office sources on the evidence of Mr Willis. The issue of directed surveillance arose as a result of the evidence filed by the SSHD. I have decided not to refuse permission to amend on the grounds of delay.

259. The parties agreed that this claim did not fall within the exclusive jurisdiction of the IPT. The Claimant accepted that if he had brought a complaint, then by virtue of s65(4) the non-exclusive jurisdiction of the IPT was engaged and so the issue would become which was the more appropriate forum, the IPT or the Administrative Court. Mr Sanders submitted that the more appropriate forum for complaints about unauthorised directed surveillance was the specialist IPT itself as found by *AJA v Commissioner of Police for the Metropolis* [2013] EWCA Civ 1342, [2014] 1 WLR 285 [at 41].

260. Mr Bowen submitted that the appropriate venue was the Administrative Court because authorisation should have been sought and because of the interference with the right to privacy under Article 8 ECHR which was already before the court. If considered by the IPT, it risked inconsistent outcomes on the question of whether those rights were interfered with.

261. In my judgment, [41] of *AJA* does not go quite so far as Mr Sanders suggests. It referred to a different case in which the IPT had had to decide whether certain activities were directed surveillance. It used the coherence of the RIPA scheme and its special procedures for dealing with claims and complaints about the use of investigatory powers as relevant to its decision as to whether certain activities constituted directed surveillance. The decision in *AJA* at paragraphs 56-59 considered whether proceedings in the High Court should be stayed in order for them to be brought in the IPT. The decision of the IPT might not amount to a full finding which could assist the High Court in reaching a decision. There was a real risk, depending on the procedure adopted and the degree of disclosure, that the High Court would be acting in breach of natural justice if it relied on findings expressed by the IPT. Thirdly, its jurisdiction was equivalent to that exercise by a court on judicial review. The fundamental test to be applied was whether there was a real risk of prejudice to the parties if the High Court proceedings took precedence over IPT proceedings.

262. I am satisfied that the Administrative Court is the most appropriate forum for this issue to be resolved in this case. I grant the application to amend without considering the merits, lest the case go further, and now turn to the arguability of the point. It is wholly bound up with one aspect of the Article 8 case.

263. S26 RIPA applies part 2 of RIPA to "directed surveillance". S26(2) defines "directed surveillance" as "surveillance":

> "if it is covert but not intrusive and is undertaken –
>
> (a) for the purposes of a specific investigation or a specific operation;
>
> (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); …"

264. S26(9)(a) provides that "surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place." "Private information" is defined in s26(10). It includes, in relation to a person, "any information relating to his private or family life". By s48(2)(a) "surveillance" includes "monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications".

265. S27(1) provides that conduct falling within s26 RIPA shall be lawful for all purposes if (a) an authorisation under Part II RIPA "confers an entitlement to engage in that conduct on the person whose conduct it is; (b) his conduct is in accordance with the authorisations". The Home Office has power to grant authorisations for the carrying out of directed surveillance but by s28(2) it shall not do so unless it believes "(a) that the authorisation is necessary on grounds falling within subsection (3); and (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out." The grounds in subsection (3) include the interests of national security and preventing or detecting crime or preventing disorder or in the interests of public safety. I have already set out what the RIPA code said in relation to privacy where activities were in or partly in public.

266. Mr Bowen submitted that the EAU went beyond reviewing material generally accessible within the public domain through its searches of the OSCT Net database. Mr Bowen submitted that the EAU's research was conducted covertly because Mr Willis, explaining why its policies should not be disclosed, said that the EAU needed to be able to observe and research its subject matter without the individuals and organisations involved being aware of and therefore seeking to avoid "its methodology". The information related to the Claimant's private life because it concerned his political and religious beliefs which, moreover, were "sensitive personal data" within the DPA s2. And in any event it was systematically collected, stored and used. This was also reflected in codes including the RIPA Code of Practice, the EAU's policy and the OSC procedural guidance. Therefore, authorisation was necessary but had not been obtained.

267. Mr Sanders said that RIPA added nothing to the Article 8 ground because Part II RIPA provided only a permissive mechanism and did not make unauthorised surveillance necessarily unlawful. That is plainly right. The RIPA did not require authorisation to be issued but it provided a justification for the purposes of Article 8(2) were it to apply. If Article 8 were interfered with and breached then relief would follow. If not, then there would be no relief, so nothing was added. I agree.

268. I also agree with Mr Sanders that surveillance is an ordinary English word which would fall outside the scope of s48(2) if it fell outside the scope of surveillance thus understood. The IPT had so held in relation to *A Complaint of Surveillance;* {2013] UKIPTrib A1-2013. It also held at [13] that the effect of section 48(2) was to include in surveillance methods of intelligence gathering that might not be covered by surveillance in ordinary English usage. Recording is only surveillance if it is undertaken in the course of surveillance. S48(2) was not a comprehensive definition of surveillance. At [47] the IPT expressed the view that the awareness and participation of an interviewee in a voluntary declared interview did not bring the activity within the scope of Article 8 and a record of the questions and answers could not, for the same reason, be an infringement of those rights.

269. On that basis, Mr Sanders submitted, the investigations carried out by the EAU in relation to the Claimant did not fall within the ordinary English understanding of "surveillance" nor did the use of the OSCT Net database cross into surveillance because the EAU had to use that database to access its own files. Besides the surveillance, if such it was, was not covert nor for the purposes of a specific investigation nor likely to result in the obtaining of private information about a person. Those were all conditions which had to be met before section 26 would apply to the surveillance anyway. Nothing that was done in relation to the Claimant's data was covert in any sensible sense even though the Claimant did not know of it. Googling his name did not mean that he was under surveillance. Reading anything about a person when he is unaware of that activity does not mean that he is under surveillance.

270. Mr Bowen referred me to what the Office of the Surveillance Commissioners said in its Annual Report for 2015-16 including a section entitled "social network and the "virtual world"". It noted that the key consideration when viewing publicly available information where no privacy settings had been applied is "the repeated or systematic collection of private information. Initial research of social media to establish a fact or corroborate an intelligence pitch is unlikely to require an authorisation for directed surveillance; whereas repeated visits building up a profile of a person's lifestyle would do so". This was repeated in its July 2016 Procedures and Guidance document "Oversight arrangements for covert surveillance and property interference conducted by public authorities and to the activities of relevant sources". In that same OSC Procedures and Guidance document at [124], the OSC considered activity in public and its relationship to private information. The Commissioners expressed what they described as the tentative view that "if there is a systematic trawl through recorded data… of the movements or details of a particular individual with a view to establishing, for example, a lifestyle pattern or relationships, it is processing personal data and therefore capable of being directed surveillance". It contrasted checking CCTV cameras or databases simply to establish events and general analysis of data for predictive purposes, which would not usually be directed surveillance, with "research or analysis which is part of focussed monitoring or analysis of an individual or group of individuals" which was capable of being directed surveillance for which authorisation might be considered appropriate.

271. Largely for reasons which I have already given when dealing with whether the actions of the EAU interfered with the Claimant's Article 8 rights, I do not consider that what they did in this case reached the level of "surveillance" at all, and certainly not directed surveillance. I have considered the frequency of examination, the circumstances, the public nature of the data, its mode of collection, the lack of what I regard as the sort of exercise, to which the comments and concerns are addressed, of drawing conclusions about personal matters from the systematic assembly of data from multiple sources; the absence of focused monitoring of the Claimant or of a group to which he belonged.

272. Mr Sanders submitted that the reference to the use of Home Office databases in EAU form 1 as completed for the Claimant was explained by Mr Willis as a reference to departmental shared files on which EAU material was stored with no information on the Claimant identified on the OSCT Net. I have dealt already with the insignificance

of the fact that he was unable categorially to say that the searches had not gone further.

273. Nonetheless, if the RIPA issue had been raised earlier the SSHD evidence would have covered the Regulation of Investigatory Powers (Directed Surveillance Covert Human Intelligence Sources) Order 2010 and the policies in place for the EAU to seek directed surveillance authorisations under RIPA in the context of its immigration-related case-work. This was covered only briefly at paragraphs 216 and 4.8 of Mr Willis's evidence. There are limitations on the individuals who can apply for authorisations to those with immigration and border security functions. This may be so, but in view of the conclusion to which I have come, this aspect needs no further consideration.

274. I have heard full argument on the point. I do not consider that, in this case, I should refuse permission because it adds nothing to the Article 8 case, although that is my view. Although I regard the argument as quite clearly wrong, I grant permission but refuse relief.

D: Equality Act duties

275. In the light of Mr Bowen's acceptance that there is insufficient evidence that the guidance produces unlawful indirect discrimination against Muslims, I see no justification for permitting such a claim to be stayed further. If, in the light of any Equality Impact Assessment, such a claim proves to be arguable, it can be brought, subject to whatever procedural counter arguments may be available. A claim which cannot now succeed should not be stayed against the prospect that in future it might proceed.

276. The claim of an alleged breach of s149 of the Equality Act was withdrawn, subject to costs.

E: Overall

277. This claim is dismissed.