

Appeal no: SC/77/80/81/82/83/09
Hearing Dates: 9th – 26th March 2010
Date of Judgment: 18th May 2010

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE WARR
MR J DALY

ABID NASEER, AHMAD FARAZ KHAN, SHOAIB KHAN,
ABDUL WAHAB KHAN and TARIQ UR REHMAN
APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
RESPONDENT

For the Appellant Abid Naseer:	Mr J Bennathan QC and Ms S Harrison (instructed by Birnberg Peirce & Partners Solicitors)
For the Appellant Ahmad Faraz Khan:	Baroness Kennedy QC and Mr E Grieves (instructed by Birnberg Peirce & Partners Solicitors)
For the Appellants Shoaib Khan, Abdul Wahab Khan & Tariq ur Rehman:	Mr A Malik, solicitor-advocate (of Amjad Malik Solicitors)
For the Respondent:	Mr R Tam QC, Mr A O'Connor and Mr S Gray (instructed by the Treasury Solicitor)
Special Advocates for the Appellant Abid Naseer:	Mr C Cory-Wright QC and Mr K Beal (instructed by the Special Advocates' Support Office)
Special Advocates for the Appellant Ahmad Faraz Khan:	Mr A McCullough QC and Mr Z Ahmad (instructed by the Special Advocates' Support Office)
Special Advocates for the Appellants Shoaib Khan, Abdul Wahab Khan & Tariq ur Rehman	Ms C McGahey and Mr B Rawat (instructed by the Special Advocates' Support Office)

The Hon. Mr Justice Mitting :

Background

1. Abid Naseer is a 24 year old Pakistani national from Peshawar. He entered the United Kingdom on a student visa issued on 5 September 2006 with leave to enter until 31 October 2009. He began a computer course at Liverpool John Moores University, but withdrew from the course after a week, claiming that it was too difficult for him. He claims that he then undertook a diploma in English at an institution with a dubious reputation, Manchester College of Professional Studies and moved to Manchester. He returned to Pakistan in 2007 and, again, between 26 September and 20 November 2008. From his return until 8 April 2009, he lived at 36 Galsworthy Avenue, Manchester, with 5 (eventually 6) other individuals who are not the subject of these proceedings. He was arrested on 8 April 2009, released without charge into immigration detention on 22 April and on the same day served with notice of intention to deport on conducive grounds for reasons of national security. He appeals against that decision. On 29 October 2009, he applied for further leave to remain. His application was refused by a letter served on 8 February 2010, under paragraph 322(5) of the Immigration Rules. He appeals against that decision, too.
2. Ahmad Faraz Khan is a 26 year old Pakistani national, from Bannu. He entered the United Kingdom on a student visa issued on 8 September 2006, to undertake a course in computer studies at Liverpool John Moores University. He became ill and withdrew from the course. He applied for, and was granted a deferral to January 2007 but, instead, claims to have undertaken a course at Manchester College of Professional Studies. He restarted a Masters course in Computer Security at Liverpool John Moores University in September 2008, with considerable success. Like all of the other appellants, he was arrested on 8 April 2009 and served with notice of intention to deport on conducive grounds on 22 April. He appeals against that decision. His original visa expired on 31 January 2008, but he applied, successfully, for it to be extended until 31 December 2009. An application for further leave to remain, made on 8 December 2009, was refused under paragraph 322(5) of the Immigration Rules, by a letter dated 22 February 2010. He appeals against that decision.
3. Tariq Ur Rehman is a 39 year old Pakistani national from Miran Shah. He is a widower, with two daughters who live in Pakistan. He entered the United Kingdom on a student visa in September 2007 with leave to enter until 31 December 2008, to study at Liverpool John Moores University. He did not attend the university and instead claims that he sought admission to Manchester College of Professional Studies, to undertake a Diploma in English. He applied for a highly skilled graduate worker visa on 28 September and was granted leave to remain until 29 September 2010. He returned to Pakistan from 16 November 2008 until 24 March 2009. On attempting to re-enter the United Kingdom, his leave to remain was cancelled and he was granted temporary admission. The reason for the cancellation was that documents which he had submitted, including a postgraduate Diploma in Business Management, purportedly issued by the Cambridge College of Learning, were false. He was arrested on 8 April 2009 and a notice of

intention to deport on conducive grounds was served on him on 22 April. He left for Pakistan on 10 June 2009, whereupon the notice of intent to deport him was revoked. On the same day, his leave to remain was cancelled under paragraph 321A(2) of the Immigration Rules. He was also refused leave to enter under paragraph 323(i) of the Immigration Rules on the ground that his presence in the United Kingdom was not conducive to the public good for reasons of national security. He appeals against both decisions.

4. Abdul Wahab Khan is a 27 year old Pakistani national from Tank. He arrived in the United Kingdom on 2 October 2006 on a student visa sponsored by Liverpool John Moores University. His leave to remain was extended until 31 December 2009. He did not undertake the course at Liverpool John Moore's University but, instead, in March 2007 claims to have undertaken a four month course at the Manchester College of Professional Studies. He began a course in computer network security at Liverpool John Moores University in September 2008, which he was undertaking successfully. He was arrested on 8 April 2009 and served with notice of intention to deport on conducive grounds on 22 April. He left the United Kingdom on 21 August 2009, whereupon the notice of intention to deport was withdrawn. On 18 December 2009 he was notified of a decision to cancel his leave to remain under article 13(7)(b) of the Immigration (Leave to Enter and Remain) Order 2000 on the ground that his presence in the United Kingdom would not be conducive to the public good for reasons of national security. He appeals against that decision.
5. Shoaib Khan is a 31 year old Pakistani national. He entered the United Kingdom in 2005 on a student visa valid until 25 August 2006, to study at Middlesex College. On 9 September 2006 he was granted further leave to remain until 31 October 2007, to study accountancy at Kaplan in Manchester. He was granted two further extensions to his visa, expiring on 31 January 2010. He made three visits to Pakistan – in December 2007, March 2008 and December 2008. He was arrested on 8 April 2009 and a notice of intention to deport on conducive grounds was served on him on 22 April. He left for Pakistan on 21 August 2009, whereupon the notice of intention to deport was withdrawn. On 18 December 2009 his leave to remain was cancelled under article 13(7)(b) of the Immigration (Leave to Enter and Remain) Order 2000 on the ground that his presence in the United Kingdom would not be conducive to the public good for reasons of national security. He appeals against that decision.
6. Despite the differences in the procedural route by which decisions to deport or exclude the appellants have been taken, the first issue in each case is the same: is it conducive to the public good for reasons of national security to deport or exclude the appellant? In Rehman's case, there is an additional ground: the making of false representations and the submission of false documents to obtain leave to remain under paragraph 321A(2) of the Immigration Rules. In the cases of Naseer and Faraz, there is a second issue: can the United Kingdom deport them without breaching their rights under Article 3 ECHR? In the cases of Rehman, Wahab and Shoaib, they seek "on Article 3 grounds" a direction "to facilitate entry clearance" for them.

National Security

7. The Secretary of State's case is that each of the appellants was a party to a plot to carry out a mass-casualty attack in North West England between 15 and 20 April 2009. The open case is founded upon a series of emails exchanged between a Pakistani registered email account sana_pakhtana@yahoo.com and an email account admittedly used by Naseer humaonion@yahoo.com between 30 November 2008 and 3 April 2009. The Security Service's assessment is that the user of the sana_pakhtana account was an Al Qaeda associate, that the messages from humaonion described different ingredients for explosives and identified, in general terms, the operatives who would carry out the attack and that, in the email of 3 April 2009, Naseer declared his and their intention to carry out a mass-casualty attack between 15 and 20 April.
8. In reaching the conclusions expressed below, we have taken into account a substantial volume of closed material. Our decisions have been based substantially or, in some instances determinatively, upon that material. The open advocates have submitted that it is not open to us to reach a decision by that means. The issue is to be determined in an appeal to the Court of Appeal in June in other cases. We have applied SIAC's settled jurisprudence on this question. If an appellate court decides that we have been wrong to do so, any unsuccessful appellant will be entitled to have his appeal re-determined in the light of the appellate court's decision.
9. For reasons which are wholly set out in the closed judgment, we are sure – satisfied to the criminal standard – that the user of the sana_pakhtana account was an Al Qaeda associate.
10. Naseer admits that he set up the humaonion account. Given that it was set up on 14 November 2008, it follows that he set it up in Pakistan (he did not fly back to the United Kingdom until 20 November). The sana_pakhtana account was set up on 30 November 2008 at 11.03 GMT in Pakistan. At 11.16 at the same day the following message was sent to the humaonion account:

“Subject: sohaib here

Hi

how are you I am fine tell me that how are you any kink of help for me so plz tell me ok. and salam to ur girl friend from my side. and how is going on ur study wish you all the best good luck

BYEEEEEEEEEEEEEEEEEEe”

At 22.33 GMT on the same day, the message was accessed at Naseer's humaonion account. On 3 December at 11.33 Naseer sent the following message to sana_pakhtana:

“Subject: sohaib here

Salam,

Thanks for discovering about me. I am doing well and having a good time. Hope you ok as well. I have been thinking of you for long time and was delighted to hear from you. How is the weather over your side? How are your mates doing? I have heard that shahkirullah was not feeling well. I hope he is, his family and friends are ok. I went to see my mates in other city and came back last week. The weather over here is very cold. I saw a slight glimpse of Huma day before yesterday but she was very weak and difficult to convince. She says she is busy with her studies and it will take her long. Nadia is more gorgeous than huma at the moment and she is easy to befriend and since new year is coming so I guess she will suit me on that moment. Nadia is crystal clear girl and it wont take long to relate with her. Her parents like me as well. What do u suggest my friend?

That’s all from my side. Pay salam to aisha and chotu.

Take care.”

On 14 December at 12.18 (following an aborted attempt at 12.10), sana_pakhtana replied:

“Subject: Re: sohaib here new mail

walaikum salam

how are u i hope u will fine. we all are fine and shakirullah and has family are find and how is going on ur study now a days ? and the weather is fine here nice weather here. and conragulation eid day u and ur family from my side.. any kind of help for us so plz tell me ok. hmm tell me that how is ur sweety girl friend I miss her alot and pay to my salam for her, Thats all from my side. Pay my salam to all students

replay me

take care”

Naseer read the message on 15 December and replied at 20.47 at the same day:

“Asalamo Aliakom

Many thanks for your Eid Greetings. Eid Mubarak to you and all your family and friends. I am very well at the moment and I also enjoyed my eid as well. We had loads of meat to eat. I did my own qurbani at home and all my mates were so delighted to see bags of meat. I am sure you had a cheerful Eid day. It is good to hear about shahkirullah,s good health. Pay my Eid greeting to him as well.

Everything is going well over here. Weather is nice and cool. We had snowfall recently followed by tonnes of rain water LOL.. My study is going well. I am looking for work at the moment because I am jobless. A friend of me told me he will keep me at this shop but without pay. The day I understand the procedure of working they will start paying me. I am happy at this place. He is a nice guy.

About my Girl Friend. As I told you about huma,s affair. She is nice and I still love her. Somebody told me she works in my friend,s shop I am going to join so lets see If she is still there. I will ask the staff and other fellows if she was or is around then we will see what happens. Nadia is still waiting for my response. She is very loyal and She has created a place in my heart. You know Gulnaz and fozia. WOW man. I would love to get them in my friends list but you know I have been thinking about their abilities. Gulnaz sounds ok but she is found of money and in order to approach her I must find work to save money. Fozia is some times bull shit. She lets you down sometime. I haven't got her contact number. I will try to figure out her contact and then I will talk to her.

I am still keeping my car because most of the jobs they ask for it and other reason is you know girls mostly like guys with car. They love money and nice car. Thats they all about.

Thats all for now. Pay my good wishes to chuto. Take care of your self.

Allah Hafiz”

On 1 January 2009 Naseer created a new account: chipyparveen@yahoo.com.
On 4 January at 13.00, he sent a message on that account to sana_pakhtana:

“Subject: Shobi

Salam Shobi How are you there? How is your family and friend,s? I hope they are ok. its very cold over here and there is no rain. The weather is dry. I am enjoying my self and my girl

friend is ok as well. I have found work so most of the time I am busy at it. How is shaki, his wife and his kids. They are grown up now I guess. Anyways thats all nothing new. Take care Allah hafiz

Zeeshan”

(Naseer explained that the signature “Zeeshan” was a mistake. This statement was not challenged). sana_pakhtana did not reply to that message. The text of the next message, sent on 15 January at 12.38 reads like a reply to Naseer’s message of 15 December 2008:

“Subject: Re:

walikum o salam

thank for good mail nice I am very happy to see it. We all are five and told me how are u. i hope u will fine inshallah. and how is going on ur study and ur life. chotooo is also fine and be happy. hmhhh so u have alot of girl friendsss me also like girlsssss pay my salam for ur girls friend ok when ever u will marii soo plz first seee ur girl friend how is she... is she nice and beautiy and honest. bec we marii in life on one time there for we can seee and be carefull and be relaxx then u marii okkkkkkk and see a new car and take buy it and any kind of help from my sife plz telll me okkkkkk

bye bye take careeeeeeee”

On 26 January, at 11.09, Naseer sent a message on the chipyparveen account, which he repeated, from the humaonion account on 16 February at 13.35:

“Subject: Salam Shobi

Salam, Well it has been long time no see LOL. Anyways I am glad to have your mail. I am doing well thanks. I have found a security job now and there is good money in it. I was in need of money because of the family problems and above all the marriage ceremony. You know what girls are like. They demands loads of stuff Jewellery, Dresses, beauty things and many more. The girls born over here are very modern so you have to take care of their demands every time. I am satisfied with my company of females LOL. They are simple and easily managable. All you have to do is to be serious and give them plenty of time. I am constantly in touch with the famalies of the girls I mentioned before and will choose which ever can be my faithfull and loving wife. I am bore of being a bachelor now

LOL so I would try to make it happen in the near future. I will be careful about my choice because your whole family life depends upon the decision. I will look at every aspect of their family and relatives and I am sure when the engagement is finalised then it will be a huge party for everyone. I am trying to include as many as possible in the ceremony when it takes place and hopefully it will happen. As you mentioned about the car, well yes I am saving some money to buy a nice and reliable vehicle which will be enough for my bride and my children in the future LOL. I hope everyone of your family members including youngsters and elders are fine and enjoying the best of their health. The weather is getting warmer nowadays and nothing new happening to write down. Pay my salam to Chotu and love to Ali. Any kind of service please do write to me. Thanks and kind regards”

Sana_pakhtana did not reply. The final message was sent on the Humation account at 16.19 GMT on 3 April 2009:

“Subject: Re: sohaib

Hi Buddy,

I am sure my mail will find you in good health and all your family members are enjoying themselves. I am doing well as usual and having good time. The weather is getting warmer here and we have loads of things to enjoy. You know how it is over here when it's summer. People go out to the beaches and go on holidays. Well we had some short trips to the riverside as well. My mates are fine and yes my affair with Nadia is soon turning into family life. I met with Nadia's family and we both parties agreed to conduct the nikah after 15th and before 20th of this month. I have confirmed the dates from them and they said you should be ready between these dates. I am delighted that they have strong family values and we will have many guests attending the party. I am sure Nadia was the right choice for me at this time because I was getting older day by day LOL. Anyways I wished you could be here as well to enjoy the party. That's all from here, nothing new to write down. Pay my love to little Hasan and regards to all your family members.

Thanks

Kind Regards”

11. In an unsigned and undated detailed witness statement prepared for these proceedings, adopted and, with amendments repeated in his oral evidence,

Naseer has provided a detailed explanation of the emails. In summary, it is as follows. He was searching for a wife. One of the means of doing so was by accessing chat rooms in which he could “meet” Muslim women. The humaonion account was set up for this purpose, as was demonstrated by the large number of accounts with womens’ names which he accessed from it. One of the accounts which he accessed was sana_pakhtana – an account, like humaonion, which bore a woman’s name. He started a conversation with “sana”, but soon discovered that, like “huma”, he was a man. He said that he was a student in Islamabad and that his name was Sohaib. He spoke to him on Yahoo Chat most days until about January 2009. They also exchanged the emails set out above. Those from him which refer to women by name refer to real women by the names by which he knew them. He met “Huma” at a bus stop in Longsight in December 2008 and, a second time, walking down the street. She gave him the cold shoulder, hence the reference in the email of 3 December 2008 to her being “difficult to convince”. She said that she worked in a cosmetics chop in Longsight, so he told Sohaib in the email of 15 December 2008 that it was his friend’s shop – to make out that he knew her better than he did. He “met” the remaining three women on the internet. Nadia and he corresponded on MSN and they agreed to meet. He sent her a picture of himself. She told him that she had shown the picture to her parents who said they liked the look of him. Hence, the statement in the email of 3 December that “her parents like me”. He thought that she was very straightforward. Hence, the reference to her being “crystal clear girl”. He had arranged to meet her at a car park in Salford, at which he waited for two hours, but she did not show up. Gulnaz talked about money and expensive things in their instant messaging chats. Hence, the statement in the email of 15 December that she was “fond of money”. Fozia said that she would not marry until she was 30, which is why he told Sohaib that she was “bull shit” and “lets you down sometime” in the 15 December email. He was going to ask for her telephone number, to try to convince her to marry before she was 30. Hence the statement that he was going to “figure out her contact number and talk to her”.

12. Naseer said that the Nadia referred to in the email of 3 April 2009 was not the Nadia to whom he had referred in the December emails. It was a reference to a real young woman, but not to her real name. The young woman was Miss Y. She gave evidence in the hearing. She was a patently truthful witness. She and Naseer did form a relationship. Save to the precise timing of the true events which she described at the end of the relationship, about which we are satisfied she is mistaken, we accept that her evidence is truthful and reliable. Her evidence, which did not differ materially from that of Naseer on the subject of the relationship was as follows. She was 17. She gained access to the Qiran.com website – a marriage website for Muslims. At the end of January or the beginning of February 2009, she “met” Naseer on that website. They exchanged email addresses and “talked” for about an hour. Thereafter, they would “speak” to each other every day for an hour or two. He said that he was looking for a wife. She did not want to get married straight away, but did want to get to know him better. She gave him her mobile telephone number. She persuaded him to set up a “Vodafone family” contract under which, for £5 a month, they could conduct unlimited telephone conversations. They did so, daily, for hours on end. She also talked (on Qiran.com) with a friend of

Naseer's. He told Naseer, who called her to say that she had broken his trust and the relationship was over. Two days later, he relented and called her again. They decided to meet. They did so outside Lidl in Kingston Upon Thames. She found him shy and personable. She was happy that she had met the right man. He told her to tell her mother, which she did. Her mother was not happy, but agreed to meet him. He drove down to London with his cousin to meet her mother on 14 March 2009. Naseer spoke to her mother, who said that she would think about the marriage proposal. In the end, she agreed to it. While she was thinking about her decision, she and Naseer agreed that they should not talk to each other and did not do so. When her mother agreed, she tried to get in touch with Naseer, by telephone and by text message, unsuccessfully. Both of them said that he emailed her to tell her that the marriage was not going forward and that she was extremely angry about his decision. She gave the date of the email as near the end of March. She put the date about 5 days before her sister's birthday on 31 March. The reason which he gave was that they were two different families: her family was modern. His was not. They did not speak by telephone after he sent the email, but they did communicate by MSN or, as he put it, instant messaging. He said that the last "conversation" which they had was on 2 April 2009. She heard nothing further from him.

13. He said that, by the morning of 3 April 2009, he had changed his mind and wanted to get back together with her. He thought that if he told her he had made a mistake, she would agree to his renewed proposal: her family had already agreed to it. There would have been a party at Miss Y's home in April, which he would have attended. Hence, the statement in the email of 3 April that both parties had agreed to conduct the nikah (Islamic wedding) after 15th and before 20th April and that many guests would attend the party. His explanation for the sentence "I have confirmed the dates from them and they said you should be ready between these dates", is that those were the dates which he had had in mind for a long time and that Miss Y's family had told him to be ready between those dates.
14. We reject Naseer's explanations for the terms of the emails, in particular the reference to four named women and the whole of his explanation for the email of 3 April, as utterly implausible. Even without the closed material, we would not have accepted it. That material satisfies us to the criminal standard that Naseer's account of the emails is a lie, deliberately told to conceal their true meaning. He has carefully woven an account of a real relationship with Miss Y into a false explanation of the emails, in particular of the 3 April email. He did not change his mind about marrying Miss Y on the morning of 3 April. We are sure that that email conveyed a sinister and alarming message to an Al Qaeda associate. What that message was, we discuss below.
15. The Security Service assesses that the references to, and comments upon, the four named women in the December emails, are references to different ingredients of explosives, their properties and availability. For the reasons which are wholly set out in the closed judgment, we are satisfied, on balance of probabilities, that that assessment is right. We have reached that conclusion despite the complete absence of any evidence of the handling or preparation of

explosives by Naseer and his alleged associates. It is a fact that, despite extensive searches of buildings associated with them, nothing has been found, apart from an irrelevant trace of RDX in one of the properties. Mr Bennathan QC submits that this sets it apart from all previous Islamist terrorist plots to cause explosions in the United Kingdom which succeeded or were disrupted before they could be carried out. With one caveat – we have heard no evidence or submission about the unsuccessful plot to set off a car bomb outside a nightclub in the Haymarket – we accept that submission. Possible answers to it were given by witness ZR in closed evidence. Although we cannot set out our reasoning in this open judgment, we can set out our conclusion: there are pointers to an imminent attack, apart from the language of the 3 April email and it is possible that one could have been carried out within the time frame indicated by it; but, in the end, we are unable to determine whether Naseer and his associates would, in fact, have been able to carry out an attack intended to cause mass-casualties between 15 and 20 April. We are, however, satisfied, at least on balance of probabilities, that, by the 3 April email, he declared to an Al Qaeda associate that that was his intention.

16. For the reasons stated, we are satisfied that Naseer was an Al Qaeda operative who posed and still poses a serious threat to the national security of the United Kingdom and that, subject to the issue of safety on return, it is conducive to the public good that he should be deported.
17. Determination of the threat, if any, posed to national security by the other four appellants depends upon whether or not they were knowing parties to Naseer's declared intention.
18. Naseer, Rehman, Wahab and Faraz, but not Shoaib, knew each other before they came to the United Kingdom. Wahab and Faraz became close friends university in Islamabad. Both were good friends – not “best” friends – of Rehman. Naseer says that he met all three at the representative office of Liverpool John Moores University in Peshawar. Wahab, Faraz and Mohammed Ramzan, who lived at 51 Cedar Road, Liverpool from January 2008 until their arrest on 8 April 2009, had intended to travel to Liverpool at the same time in the autumn of 2006. Wahab and Faraz did so, within a few days of each other, but Ramzan did not, due to visa difficulties. Naseer, Rehman, Wahab and Faraz all claimed to have attended, at some time, the Manchester College of Professional Studies. Wahab and Faraz may have undertaken genuine courses there, because they subsequently undertook the same course at Liverpool John Moores University diligently and with success; but we doubt that Naseer did so and are confident that Rehman did not. He claimed to have studied for a Diploma in English, but required a Pushtu interpreter to give evidence. Shoaib became a friend of Wahab when playing cricket together and, through him, got to know Faraz and Ramzan. He was a diligent student of Accountancy at Kaplan (latterly, in Liverpool), with an attendance record of 98% in 2008 and 100% in 2009. He says that he met Naseer on no more than four occasions. There is no evidence to contradict that claim. There is no evidence that he knew or had ever met Rehman.
19. Before Rehman flew to Pakistan on 16 November 2008, he had featured in a large number of photographs stored on, and retrieved from, a pen drive

recovered from him on his arrest. Many of them are not the sort of photographs which would have been taken to show friends or relatives. For example, there are several photographs of the Arndale Centre and its exits featuring Rehman and another man, taken on at least two different days. The Security Service considers that they may constitute hostile reconnaissance. For reasons set out in the closed judgment, we think it is more likely than not that they do. We do not accept Rehman's explanation that they were tourist photographs. When he was cross-examined about them by Mr Tam QC, he prevaricated and claimed not to understand the purpose of the questions: "What do you want to do by asking a question like that – my mind has not been able to grasp your question".

20. The photographs were taken before Rehman left for Pakistan on 16 November (some of them show trees in leaf and people in shirt sleeves). Although his visit to Pakistan overlapped Naseer's visit by no more than four days, he met Naseer in Peshawar twice – he says, once at a restaurant and once to give him money which he had brought over with him from the United Kingdom. The last explanation was remarkable: he said that after the first meeting, he had left Peshawar and so had to return to give Naseer money which he could easily have given to him before he left. We are satisfied that we have not been told the truth about these meetings by Rehman.
21. On 30 November 2008, 10 days after his return from Pakistan and on the same day as the sana_pakhtana account was created, Naseer visited 51 Cedar Grove, Liverpool. It is now accepted that both Wahab and Faraz were there when he did so. Faraz originally claimed that he may have been working on his computer in the Liverpool John Moores University library and, in the course of his cross-examination, challenged Mr Tam to demonstrate that that was not so. He did, by undisputed evidence from the university that Faraz did not visit the library on 30 November. The record of computer use at 51 Cedar Grove on 30 November shows that Faraz made extensive and continuous use of his computer for ordinary work purposes until shortly after 22.02. The same record shows that Naseer's samebutdifferent@gmail.com was accessed on Wahab's computer at 22.23. It is not disputed that 10 minutes later, Naseer accessed the first sana_pakhtana email on the same computer. In his email of 3 December to sana_pakhtana, Naseer stated "I went to see my mates in other city and came back last week". We are satisfied, at least on balance of probabilities, that that was a reference to his visit to 51 Cedar Grove on 30 November (a Sunday). It follows that the "mates in other city" at least included Wahab and Faraz. Given that the message was the first of a series about an intended attack, we are satisfied that this part of the message was not inconsequential social discourse, but an indication, by Naseer, that he had seen people whom he intended should play a part in his plan.
22. The next meeting on which the Security Service relies is the party held at 51 Cedar Grove on 23 March 2009. We accept that there was a party, attended by a number of people, some of whom were nothing to do with any plot. Attendance at the party is not, as such, an indicator of participation. We do not regard the fact that Shoab took time off work to attend it as significant, nor the fact that this was the second occasion upon which he had met Naseer (the

first was during Ramadan in 2008). The meeting was of significance for Naseer, Wahab and Faraz, for the reasons explained in the closed judgment. We are satisfied that it was not just a coincidence that it took place the day before Rehman returned from Pakistan. One superficially unimportant part of Faraz's evidence did not ring true: he claimed that Naseer's impending marriage was discussed at the party and that, after most of the guests had left, he said that he wanted to get married to the girl, was in love, but was waiting for her mother's decision. For reasons set out in the closed judgment, we believe this part of his evidence to be untrue. We prefer Shoaib's evidence that either nothing was said about Naseer's marriage or he could not remember anything being said about it.

23. For the reasons set out in the closed judgment, we regard attendance at the meeting on 1 April as of great significance. Those who attended were Naseer, Rehman, Wahab, Faraz and Ramzan. Wahab, Faraz and Ramzan drove over to Manchester to meet Naseer and Rehman. Their purpose was not, as they claimed, to welcome Rehman back from Pakistan, to commiserate with him about the death of his father. In paragraph 11 of his detailed witness statement, dated 30 October 2009, Rehman gave the following account of the reason for his return to Pakistan and what happened there:

“In November 2008 I returned to Pakistan as both my parents were ill. My father sadly passed away and so I stayed for a while to help with the funeral arrangements and to console my family.”

In an earlier statement made for the purpose of a bail hearing, and in his oral evidence, he said that his father had died in April 2008. When asked to explain the difference, he said:

“I am only human. Humans do make mistakes. I have made a mistake about the dates”.

Mr Malik sought to deflect the blame for the error to his firm, by attributing the words in paragraph 11 to a drafting error; but privilege has not been waived on any material to explain it and it does not explain Rehman's own answers about how the error came to be made. Wahab said in evidence that he thought that Rehman's father had died in September 2008. Faraz said that Wahab had told him that Rehman had returned from Pakistan and said something about his family being upset because his father had died. None of this makes sense. We are satisfied, at least on balance of probabilities, that this bungled attempt at explaining the reason for the meeting is an attempt to cover up its true purpose. That purpose was connected with the 3 April email. It is not a coincidence that Naseer's “mates in other city” and the man whose image appeared in many of the suspect photographs who had returned from Pakistan a few days before, met together less than two days before an email announcing an intention to carry out a mass-casualty attack was sent to an Al

Qaeda associate. It is also a fact of some significance that Shoaib did not attend the meeting.

24. For the reasons explained in the closed judgment, we do regard Naseer's trip to Liverpool on 4 April, to see the occupants of 51 Cedar Grove as significant. We accept that Faraz was not there throughout the whole of 4 and 5 April and did refuse to give Naseer the password to his computer. We accept that, at some time during the weekend, he visited Fatou Fatty and (with others) Layak, in hospital. We readily accept that the whole weekend was not devoted to attack planning. All that can safely be inferred is that there was time for Naseer's "mates in other city" to discuss it during his visit, which lasted until the morning of 6 April. The Security Service places significance on Shoaib's arrival, with Wahab and Ramzan, on 4 April. There is nothing to show that this was not simply a coincidence: he had undoubtedly been playing cricket with Wahab that afternoon and returned with him with a view to spending the evening together socialising.
25. The Security Service also place significance on an apparently pointless drive lasting just over 2 hours around the Wirral peninsula in the late afternoon and early evening of 5 April. The drive took place in Shoaib's car, with him driving. Naseer, Wahab and Faraz were passengers. The occupants of the car disagree about whether or not it stopped during the drive, to permit some or all of them to walk on Hoylake Beach. We accept the assessment of the Security Service that the drive provided an opportunity to talk about attack planning. We make no finding about whether or not such discussion occurred. If we were to be satisfied that it had, it would not necessarily have implicated Shoaib, who does not speak Pushtu. A short discussion in that language could have occurred, without arousing suspicion or concern on his part.
26. For the reasons set out above, and in the closed judgment, we are satisfied, on balance of probabilities, that Wahab was a committed Islamist extremist and that he and Rehman were knowing participants in Naseer's plans. Subject to Mr Malik's submission that a direction should be given to facilitate entry clearance for them, we are satisfied that it would not be conducive to the public good to permit them to re-enter, for reasons of national security.
27. Faraz's case is, in principle, indistinguishable from Wahab's, for the reasons set out above and in the closed judgment. He and his father have, however, given evidence which has caused us to examine and re-examine that conclusion with care. His father was a forceful and truthful witness, save, perhaps, about the financial affairs of his family (from which we draw no inference adverse to him or to his son). As a government servant and postmaster in Bannu, he is far more likely to be a target, than a supporter, of the Taliban. He expresses forthright, and we have no doubt, truthful, views about extremism: he denounces it. He has provided for the education of his children, including daughters, to a high level. We have no doubt that he is not a supporter of Islamist extremism in any of its guises. He clearly, and strongly, believes in his son's innocence of the allegations made against him. In his witness statement, and in his descriptions of his early life in Pakistan, Faraz gives a convincing account of aligning himself with his father's views. If the conclusion which we have reached – that he was, on balance of probabilities, a

knowing party to Naseer's plans – is right, he must have undergone a radical change of view between leaving home and arriving in the United Kingdom. For reasons which are largely set out in the closed judgment, we are satisfied that he must have done, so that by the time he arrived in the United Kingdom he shared the outlook of his close friend Wahab. By coming to the United Kingdom to share a house with him and by participating in the events which led to the sending of the 3 April email, he can safely be taken to have been willing to participate, with Wahab, in Naseer's plans.

28. Shoaib is in a different position. He is from a settled area of Pakistan, not the troubled North West. He did not know any of the other four appellants before he arrived in the United Kingdom in 2005. He does not speak their first language. He did not attend or claim to have attended the Manchester College of Professional Studies: he was a genuine student of Accountancy at a reputable college. Nothing in the manner in which he gave his evidence caused us to doubt that he was telling the truth: he answered questions in a calm and straight forward way and did not (like Faraz) bluster or (like Wahab and Rehman) prevaricate. There is nothing necessarily suspect about the first three occasions on which he met Naseer. He volunteered the first (in Ramadan 2008 – we do not regard it as suspect that he put his first meeting with a man who was no more than an acquaintance somewhat later when interviewed by the police). His attendance at the party on 23 March gives rise to no greater suspicion than that of other individuals who attended and are not now the object of suspicion. His arrival at 51 Cedar Grove on 4 April 2009 is explained by his returning from the cricket match in which both he and Wahab played. Only the drive to the Wirral on 5 April gives rise to real grounds for suspicion – which is capable of being dispelled by the difference in first language between him and the other three. We accept that the police had reasonable grounds to arrest him on 8 April and that the Security Service reasonably suspected that he was a knowing party to Naseer's plans. We are, however, satisfied on balance of probabilities, on the basis of the open and closed material, that Shoaib was not a knowing party to his plans and that the grounds for suspicion that he was have largely been dispelled and do not now reach the threshold of reasonable suspicion. Even if we were to adopt a less stringent test in relation to proof of past events than the balance of probabilities, we would not have determined that it is conducive to the public good for reasons of national security that he should be excluded from the United Kingdom. We accordingly allow his appeal. It would not be appropriate for us to give directions under section 87 Nationality, Immigration and Asylum Act 2002. It is for the Secretary of State to determine what should be done in the light of our judgment.

Additional Ground for excluding Rehman

29. When Rehman submitted his application for leave to remain under the Tier 1 (Post Study Work) scheme, he submitted a postgraduate Diploma in Business Management at Cambridge College of Learning to UKBA. He also told an Immigration Officer that he had undertaken the diploma course between 17 September 2007 and 25 August 2008. Both the document and the representation were false, as he admitted in evidence (though not in his

witness statement, which contains the lie that he completed the diploma). He said in evidence that he bought the diploma from a man called Bilal at the Manchester College of Professional Studies, for £2000. He admitted that he used it to gain a two year extension of his visa. He admitted that he did not study Business Management. It has now been authoritatively determined that Cambridge College of Learning never offered a Diploma in Business Management: *NA and Others (Cambridge College of Learning) (Pakistan) (2009) UK AIT 00031*. The Immigration Officer who cancelled his leave to remain on his return to the United Kingdom on 24 April 2009 was, accordingly, required to do so under paragraph 321(A)(2) of the Immigration Rules. Subject to Mr Malik's argument, referred to above, there is no basis upon which we could properly interfere with that decision.

Safety on return

30. Subject to Mr Malik's point, this issue only arises in the cases of Naseer and Faraz. As in other cases where this issue arises, the issue gives rise to two basic questions: does what is known about the conduct of state agencies in the country to which it is proposed to deport the appellants give rise to substantial grounds for believing that there would be a real risk of ill-treatment sufficient to infringe their rights under Article 3 if it occurred in a Convention country at the hands of those agencies?; if so, are there arrangements, assurances or particular circumstances which provide a sufficient guarantee that the individual appellant would be protected against the risk of such treatment? (This is a slightly lengthier formulation of the test applied in *Saadi v Italy* (2009) 49 EHRR 30 paragraphs 146 and 148).
31. In the light of two answers, given in the course of his oral evidence, by Mr Layden, with his customary forthrightness, the first question can be dealt with shortly. It is common ground that Naseer would be at risk of being detained and questioned by the Inter-Services Intelligence Agency (ISI) at some stage after his deportation. It is not unlikely that Faraz would be as well, particularly if Naseer were not to be deported. Mr Layden accepted two propositions, put to him, respectively, by SIAC & Mr Bennathan:

“An individual suspected of terrorism by the ISI would be at a high risk of torture or inhuman or degrading treatment but for factors particular to this case”

and

“ISI is in the category of intelligence and security agencies who do not share our standards”.

(The answers were given in a private session, from which members of the public and the appellants were excluded, but can be repeated here without infringement of rule 4 of our procedure rules).

32. If justification for those answers were required, it is provided in the report and evidence of Mr Ali Dayan Hasan. We found him to be an impressive and knowledgeable witness – a view shared by Mr Layden. His sources are not identical to those available to the British Government, but they are extensive, and they do include first hand reports from participants, on both sides, in interrogations of terrorist suspects by the ISI, frequently given on condition of anonymity. Save for the controversial question about the alleged complicity of British intelligence officers in alleged ill-treatment of detainees, upon which it is unnecessary for us to express any view, we accept the thrust of Mr Hasan’s evidence. In summary, it is as follows. Despite the restoration of a democratically elected Parliament and government, after eight years of military rule, Pakistan remains a state dominated by its military and intelligence agencies. There is a long and well-documented history of disappearances, illegal detention and of the torture and ill-treatment of those detained, usually to produce information, a confession or compliance. Al Qaeda and the Taliban are now in active conflict with the Pakistani state. In 2009, there were 90 suicide bombs and 3000 killed. Anyone, such as Naseer, suspected of belonging to either would be at risk at the hands of the ISI. Legal controls are inadequate. Individuals suspected of terrorism can be held in preventative detention for up to a year subject, notionally, to three-monthly review by a judicial board. A recent presidential ordinance of October 2009 permits those suspected of terrorism to be detained for up to 90 days without judicial oversight or the right of access to a court. Pakistan has signed, but not ratified the United Nations Convention against torture. To date, the Supreme Court, which has displayed a genuine interest in those who have been made to disappear, has not held a single military official accountable for abuses.
33. Nothing in the large volume of published material with which we have been supplied about conditions in Pakistan contradicts the picture painted by Mr Hassan. On the contrary, it provides substantial support for it.
34. The Secretary of State seeks to avoid the conclusion which would otherwise inevitably be drawn from this material – that there are substantial grounds for believing that Naseer and Faraz would be at real risk of prohibited ill-treatment if they were to be returned to Pakistan – by relying on circumstances particular to those arrested on 8 April 2009 and on circumstances which can only be described in the closed judgment. There are three open circumstances: the public attention which the case of those arrested has attracted in Pakistan; what happened to the eight (of the ten arrested) who returned to Pakistan between 10 June and 12 October 2009; and the role of the judiciary. As to the first two, it is undoubtedly true that the eight who returned did so in the public spotlight and have come to no harm. On the whole, opinions expressed in the media have been favourable to them, including a reported statement by the Pakistani High Commissioner in London that the alleged plot was “a hoax”. It is also true that none of the eight have come to any harm. Mr Layden believed, on the basis of what representatives of the British High Commission in Islamabad observed, that most had not been detained or spoken to by members of the Federal Investigation Agency at the airport; but it is now accepted that the three appellants escorted back by Mr Malik were detained for a short period after representatives of the High Commission had left and then released

on bail. Mr Hasan's opinion is that, although publicity can provide a measure of protection for those suspected of terrorism, it is no guarantee of their safety. We accept his view. The published record of the ISI suggests that, if they thought it necessary, they could and would secure the detention of the appellants away from the public eye. (The FIA would detain the individual and hand him over to the ISI for interrogation). Mr Layden's third open circumstance – the role of the judiciary – has, as he puts it, "implications for the Pakistani security and intelligence apparatus"; but, for the reasons explained by Mr Hasan, does not provide an effective safeguard against ill-treatment or worse.

35. In the end, the circumstances upon which Mr Layden relies to support his firmly stated belief that there is no real risk that any appellant would be subjected to prohibited ill-treatment by the ISI are circumstances which can only be considered in closed session and set out in the closed judgment. No open assurances were given by the Pakistani authorities. With our approval Mr Bennathan QC made submissions about the approach which we should in principle, adopt to confidential assurances, if given.
36. The issue has arisen before. On 12 July 2006, in an interlocutory judgment in the cases of *Y* and *Othman*, a panel of SIAC, presided over by its then President Ouseley J, ruled that closed evidence was admissible to support an open assurance given by a government to the United Kingdom, but, in paragraph 58, observed:

“Nonetheless, we wish to make one point clear, which emerged more clearly during the substantive appeals. It is our view that the SSHD cannot rely on any substantive assurance unless it is put into the open. It may be the case that encouraging or supportive comments, even if described as assurances by the Government's interlocutors, should remain in closed if for example they are steps en route to an agreement. But the key documents or conversations relied on to show that an Appellants return would not breach the UK's international obligations or put him at risk of a death sentence or death penalty have to be in the open evidence. SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded.”

Those observations were approved by Lord Philips in *RB (Algeria) v SSHD* [2009] 2WLR 512 paragraph 102. It is true that Lord Philips's answer to the question, could SIAC rely on closed material when determining the safety on return issue?, although the same as that of the other members of the appellate committee, was reached by a different route. Mr Bennathan accepts that his observations are not part of the *ratio decidendi* of the case and are persuasive only. Mr Tam submits that, properly construed, SIAC's ruling did not prevent reliance on confidential assurances or, if it did, it should be departed from. His construction of the phrase “substantive assurance” is that it means, and means

only, a formal memorandum of understanding or government to government assurance. We do not agree. The fourth sentence of paragraph 58 of SIAC's judgment makes it clear what it had in mind: "the key documents or conversations relied on to show that an appellants return would not breach the UK's international obligations...". If the "key documents or conversations" are not formal government to government assurances, they none the less remain the "key documents or conversations", because they are the only assurances upon which reliance can be placed. We also decline Mr Tam's invitation to depart from SIAC's statement of principle. The assessment of the value of assurances is not a matter of law. Nevertheless, SIAC has adopted four yardsticks by which it will ordinarily assess the reliability and value of assurances. They were set out in *BB (RB in the appellate courts)* and were not criticised – indeed they appear to have been accepted – by appellate courts. The first and fourth give rise to problems if the assurances are not made public: the terms of the assurances must be such that, if fulfilled, the individual will not be subject to prohibited ill-treatment; and fulfilment of the assurances must be capable of being verified. It is theoretically possible that a written private assurance could satisfy the first requirement, but unless it was written and unequivocal, it would be open to later misunderstanding and would, in any event, be publicly deniable. Verification of a confidential assurance would be problematic and could not provide the protection to an individual which public scrutiny, by the High Commission, by local media, by family and by organisations such as Human Rights Watch and Amnesty International, can provide. For these reasons, we agree with SIAC's observations in *Y* and *Othman* and would not be willing to accept confidential assurances as a sufficient safeguard against prohibited ill-treatment in a state in which otherwise there was a real risk that it would occur.

37. Without the circumstances which we have considered in the closed judgment we doubt that Mr Layden could reasonably have expressed himself in the confident terms which he did; and, in any event, despite our great respect for his views and judgement, we would not be prepared to find, on the basis of them, that there existed a sufficient safeguard against prohibited ill-treatment of any of the appellants. For that reason, we allow Naseer's appeal on the issue of safety on return. We can, at present, see no ground for distinguishing the case of Faraz and, therefore, on the same ground, allow his appeal.
38. If that view is wrong, as a matter of law, we have set out our findings on the circumstances described in the closed sessions in the closed judgment.
39. The reaction of the Pakistani authorities to this judgment may demonstrate, in the case of Faraz and, even, possibly, in the case of Naseer, that, assurances apart, there would be no real risk of prohibited ill-treatment in either case. If those who have returned to Pakistan, including Wahab and Rehman, are not detained or, if detained, are not subjected to prohibited ill-treatment or otherwise dealt with in an unlawful manner, that may be powerful evidence that the risk to Faraz and, possibly, Naseer, may be judged to have been reduced to a level below the threshold of real risk.
40. We unhesitatingly reject Mr Malik's submission that the appeals of Wahab and Rehman should be allowed, notwithstanding our findings on national

security, for reasons of principle and fact. Article 1 of the ECHR requires contracting states to “secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention”. The Grand Chamber of the Strasbourg Court authoritatively identified the scope of Article 1 in *Bankovic v Belgium* (2007) 44 EHRR SE5 in paragraphs 59 to 73 of its decision. The following principles are clearly stated:

“59. As to the “ordinary meaning” of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial...

61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case....

62. The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case [the exercise of military power in another state]...

63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the travaux préparatoires which demonstrate that the Expert Intergovernmental Committee replaced the words “all persons residing within their territories” with a reference to persons “within their jurisdictions” with a view to expanding the Convention’s application to others who may not reside, in the legal sense, but who are, nevertheless, on the territory of the Contracting States...

67. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that the acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.

71. In sum, the caselaw of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that Government”.

The United Kingdom has no jurisdiction over Pakistani citizens physically present in Pakistan, such as Wahab and Rehman. It cannot “secure” to them the right not to be subjected to ill-treatment of a kind which, if it occurred within a Convention state, would breach that state’s obligations under Article 3. These facts do not fall into the exceptional circumstances identified by the Court in paragraph 71 of *Bankovic*.

41. The reasons of fact for rejecting Mr Malik’s proposition are as follows. Wahab and Rehman find themselves in their current predicament because of their own voluntary actions, beginning with their decision to come to the United Kingdom. While here, they participated in events which posed a serious and immediate threat to the national security of the United Kingdom. Despite that, they had the opportunity to appeal against the notice of intention to deport them from the United Kingdom. They could not have been removed while their appeal was pending: section 78 Nationality, Immigration and Asylum Act 2002. They chose to return to Pakistan and to appeal against the immigration decisions subsequently taken, as, of course, is their right. They chose to return in a blaze of publicity and to waive the anonymity which would otherwise have been afforded to them in these proceedings. They complain that they were assured that the notice of intention to deport them would be revoked and that no deportation order would be made if they returned to Pakistan. It was always inevitable that the notice of intention to deport would be withdrawn and no deportation order made when they returned to Pakistan: no-one can be deported who is not here. Further, our understanding of the discussions which preceded their departure is that it was made clear to them that, if they were to return, an immigration decision would then be made against which they would have a right of appeal. That was done. By exercising that right, they inevitably ran the risk that a finding adverse to them would be made on the issue of national security, as it has been. Neither principle nor the facts require SIAC to “allow their appeal on Article 3 grounds” and direct that their re-entry to the United Kingdom should be facilitated.
42. For the reasons given, the appeals of Wahab and Rehman are dismissed.

Other matters

43. We accede to Miss McGahey’s suggestion that, before this judgment is made public, we should hear submissions about what, if any, steps should be taken to deal with the consequences of our decision for Wahab and Rehman.
44. In the light of our findings, it is unnecessary for us to consider further the open advocates’ request for an order that some or all of the documents inadvertently disclosed to them should be made public. The purpose of further disclosure would not be to permit us to deal fairly with the appeals, but to satisfy public interest, legitimate or otherwise, in the matters contained in the documents. The ad hoc procedure which was eventually adopted with the consent of all sides (permitting the open advocates to make full use of the inadvertently disclosed documents, on condition that they were not disclosed to the appellants personally or to anyone else) has ensured that they could be fully deployed by the open advocates. Further, as our open judgment on the issue of

safety on return demonstrates, they are not determinative of this appeal. There is a confidential, but not closed, judgment in which, for the sake of completeness, we have briefly set out our findings on the principal issues canvassed in the private hearing.

45. For the avoidance of doubt, lest our decision to hold a private hearing should at some later stage be challenged, we are satisfied that we had the power to order it under rule 43(2) of our procedure rules.