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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 11th November 2009

B e f o r e:

MR JUSTICE COLLINS

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Between:

THE QUEEN ON THE APPLICATION OF SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

v

BC
BB

Defendants

- - - - - - - - - - - - - - -

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Mr Max Hill QC and Mr Andrew O'Connor (instructed by the Treasury Solicitor) appeared on behalf of the **Claimant**
Mr Hugh Southey and Ms Michelle Butler (instructed by Messrs Ahmed and Co) appeared on behalf of **BC**
Mr Tim Moloney and Mr Jude Bunting (instructed by Messrs Tuckers) appeared on behalf of **BB**
Mr Charles Cory-Wright QC and Ms Helen Mountfield (instructed by SASO) appeared as **Special Advocates for BC**
Ms Judith Farbey and Mr Stephen Cragg (instructed by SASO) appeared as **Special Advocates in BB**

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J U D G M E N T

1. MR JUSTICE COLLINS: Both BB and BC were made the subject of control orders on 24th February of this year. Those orders contained various obligations which it is accepted meant that Article 6 of the European Convention on Human Rights applied. Following the decision of the House of Lords in AF (No 3) [2009] 3 WLR 74, on 5th October 2009 Mitting J considered whether there had to be further disclosure of material relied on by the Secretary of State in order to comply with the requirements of Article 6. He decided that some further disclosure was needed. The Secretary of State decided in each case that such disclosure was not possible on grounds of national security. He therefore revoked the orders which had been made in February and has replaced them with the present orders which were made on 9th October of this year.

2. The hearing before me was intended to constitute the hearing, which would in accordance with section 3(10) of the 2005 Act decide whether the orders should be maintained. It was fixed in relation to the previous orders, but it was envisaged that it could deal with the fresh orders. This was because the Secretary of State contends that the obligations contained in the new orders are, as it is put, light enough to mean that Article 6 does not apply or, if it does, no further disclosure is required.

3. Counsel were all of the view that the sensible course for me to adopt was to deal with the application of Article 6 as a preliminary point. If I were persuaded that the Secretary of State was correct and no further disclosure was needed, because the special advocates could deal with the closed material on such information as they had from the controlees, those representing the controlees would want to appeal rather than have a section 3(10) hearing which they would submit was unfair. If I were persuaded that the Secretary of State was wrong and so further disclosure might well be needed, he would want to reconsider the position and in all probability seek a ruling from the Court of Appeal. I accepted that a preliminary ruling was in those circumstances desirable. It is, I think, obvious that AF (No 3) has created a real difficulty for the Secretary of State to uphold many control orders to which Article 6 clearly and unarguably applies. This would cover all control orders which have hitherto been made, save perhaps for a few in which the open material suffices to justify them and the obligations imposed by them. So, in an endeavour to maintain some control over those who the Secretary of State suspects of being involved in terrorist-related activities, he has reduced the obligations to a minimum. He asserts that that minimum as applied in these cases enables him to avoid the requirements of AF (No 3) and Article 6 and to revert to the position which was understood to apply before AF (No 3). Thus no more disclosure is needed and the special advocate procedure would provide the necessary safeguards for the controlees even though they might be unable to deal with specific allegations or material because of lack of knowledge of such allegations and material.

4. While not identical, the obligations in the orders before me are similar. In BB's case, they contain the following requirements:

    1. That he continue to reside at his present address and give at least two working days notice in writing if he intends to stay overnight or longer at any other address.

2. To report to a nominated police station every day.
3. To surrender any passport, identity card or travel document and not to apply for or have in his possession any document or ticket which would enable him to travel outside Great Britain without permission from the Home Office. He was also not to travel outside Great Britain, to be present at an airport or seaport or any part of a railway station which provides access to an international rail service without permission of the Home Office.
4. Not to associate with BC without prior permission of the Home Office.

5. In BC's case, the requirements are the same, save that he is not to associate with BB and one other named person without permission from the Home Office.

6. That the obligations under the present control orders are very considerably less restrictive than those which with one important exception have applied to control orders which have been considered by the courts hitherto is clear. The concession that Article 6 applied was because it was accepted that the effect of control orders was decisive for civil rights in some respects at least; see per Lord Bingham in Secretary of State for the Home Department v MB [2008] 1 AC 440 at page 470F.

7. The exception is important since it was MB's order. The obligations imposed in his case are referred to in paragraph 22 in the Court of Appeal in that case. The obligations were as follows:

> (a) "(1) You will reside at [a given address] and shall give the Home Office at least 7 days prior notice of any change of residence.
>
> (b) (2) You shall report in person to your local police station ... each day ...
>
> (c) (3) You must surrender your passport [et cetera or travel document or document which would enable you to travel in your possession]
>
> (d) (4) You must not leave the UK..."

8. And you must not be present at any airport, seaport et cetera. As will be clear, those obligations are the same, with minor variations, as those which are applicable in these cases, but there is an additional one:

> (a) "(6) You must permit entry to police officers and persons authorised by the Secretary of State, on production of identification, at any time to verify your presence at the residence and/or to ensure that you can comply with and are complying with the obligations imposed by the control order. Such monitoring may include but is not limited to:-

(b) a search of the residence;

(c) removal of any item to ensure compliance with the remainder of the obligations in these orders; and

(d) the taking of your photograph."

9. It was that obligation, number (6), that led to the concession that Article 6 was applicable and indeed none of the judges who considered the case questioned the propriety of that concession. The report in the House of Lords ([2008] 1 AC 480) does not mention that particular obligation in relation to search and seizure and it is interesting to note that Lord Bingham in his speech of course refers to the concession and makes it clear that that concession was not that the mere fact that it is a Convention right that may be breached means that there is an application of Article 6 because a Convention right is a civil right, but refers to the propriety of the concession that Article 6 applied. It is perhaps unfortunate for those who look at the House of Lords decision that it was not made clear what the basis of the concession was, namely, as I say, that the search and seizure would constitute a trespass. No doubt, the absence of that requirement in these control orders was deliberate because it was recognised that, had it been included, it would inevitably have meant that Article 6 was applicable and it is not anywhere suggested, and indeed it would not be, I think, the case, that if Article 6 is applicable because of a particular obligation then it is not generally applicable to the consideration of the control order provisions.

10. As I have said, the concession did not extend to an acceptance that Convention rights had been converted to become civil rights by the Human Rights Act of 1998. Thus, in MB in the Court of Appeal [2007] QB 415, in paragraph 38 of page 443G, Lord Phillips, giving the judgment of the court, said:

(a) "35. It is arguable that, by giving a remedy in civil proceedings for infringement of Convention rights, the Human Rights Act has converted those rights into civil rights, so that Article 6 applies to them. Mr Burnett has not accepted this analysis and has rightly submitted that it is not necessary for us to decide whether it is correct as it is conceded that the control order adversely affects MB's civil rights and thus that these proceedings involve the determination of his civil rights and obligations."

11. Article 6(1) provides:

(a) "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

12. The Strasbourg jurisprudence establishes that civil rights and obligations have an autonomous meaning. In R (Alconbury Ltd) v Environment Secretary [2003] 1 AC

295 at page 327, Lord Hoffmann gave a useful history of the jurisprudence relating to the application of Article 6. At paragraph 78, Lord Hoffmann said this:

(a) "78. As a matter of history it seems likely that the phrase 'civil rights and obligations' was intended by the framers of the Convention to refer to rights created by private rather than by public law. In other words, it excluded even the right to a decision as to whether a public body had acted lawfully, which English law, with that lack of a clear distinction between public and private law which was noted by Dicey, would treat as part of the civil rights of the individual. Sir Vincent Evans, in his dissenting judgment in *Le Compte, Van Leuven and De Meyere v. Belgium* (1981) 4 EHRR 1, 36, said that an intention that the words should bear this narrow meaning appeared from the negotiating history of the Convention. In his dissenting judgment in *König v Federal Republic of Germany* (1978) 2 EHRR 170, Judge Matscher said that the primary purpose of article 6(1) was, by way of reaction against arbitrary punishments under the Third Reich, to establish the right to an independent court in criminal proceedings. The framers extended that concept to cases which, according to the systems of the majority of contracting states, fell within the jurisdiction of the ordinary courts of civil law. But there was no intention to apply article 6(1) to public law, which was on the continent a matter for the administrative courts.

(b) 79. These views of the meaning of 'civil rights and obligations' are only of historical interest, because, as we shall see, the European court has not restricted article 6(1) to the determination of rights in private law. The probable original meaning, which Judge Wiarda said, at p 205, in *König's* case was the 'classical meaning' of the term 'civil rights' in a civilian system of law, is nevertheless important. It explains the process of reasoning, unfamiliar to an English lawyer, by which the Strasbourg court has arrived at the conclusion that article 6(1) can have application to administrative decisions. The court has not simply said, as I have suggested one might say in English law, that one can have a 'civil right' to a lawful decision by an administrator. Instead, the court has accepted that 'civil rights' means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law.

(c) 80. The seminal case is *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455. This concerned an Austrian statute which required transfers of agricultural land to be approved by a

District Land Transactions Commission with a right of appeal to a Regional Commission. In the absence of approval, the contract of sale was void. The purpose of the law was to keep agricultural land in the hands of farmers of small and medium holdings and the District Commission was required to refuse consent to a transfer which appeared to violate this policy. This was a classic regulatory power exercisable by an administrative body. The court nevertheless held that article 6(1) was applicable to its decision on the ground that it was 'decisive' for the enforceability of the private law contract for the sale of land. Thus a decision on a question of public law by an administrative body could attract article 6(1) by virtue of its effect on private law rights. On the facts, the court held that article 6(1) had been satisfied because the Regional Commission was an independent and impartial tribunal.

(d) 81. The full implications of *Ringeisen* were not examined by the court until some years later. It led in *König v Germany* 2 EHRR 170 to a sharp disagreement between those members of the court who saw it as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals and those who regarded it as a potential Pandora's box and wanted to confine it as narrowly as possible. Dr. König was a surgeon charged with unprofessional conduct before a specialist medical tribunal attached to the Frankfurt Administrative Court. It withdrew his right to practice and run a clinic. He appealed to an administrative Court of Appeal and there followed lengthy and complicated proceedings. His complaint to the European court under article 6(1) was that he had been denied the right to a decision 'within a reasonable time'. But this raised the question of whether, in principle, article 6(1) applied to disciplinary proceedings before an administrative court. By a majority, the court held that it did. On the *Ringeisen* principle, it affected private law rights such as his goodwill and his right to sell his services to members of the public."

13. He then deals with Judge Matscher's dissent and in 83 continues:

(a) "83. The majority view which prevailed in *König's* case has enabled the court to develop a jurisprudence by which it has imposed a requirement that all administrative decisions should be subject to some form of judicial review. Sweden, for example, has been held to be in breach of article 6(1) on a number of occasions because it lacked any procedure by which a Government decision could be challenged in the courts [he cites various cases]. In *Benthem v The Netherlands* (1985) 8 EHRR 1 the Netherlands was similarly held to be in

breach because in constitutional theory the administrative court to which an appeal lay only tendered advice to the Crown which it was entitled to reject."

14. I do not think it is necessary to read further. Lord Hoffmann repeated those observations in relation to the history of the approach in Strasbourg in Begum v Tower Hamlets [2003] 2 AC 430.

15. It follows that the original distinction between private and public law is not now to be regarded as determinative as to whether Article 6 applies. But the existence of a private right which is directly affected by the decision of a public body is of importance since it is likely to lead to the application of Article 6. I have used the adverb "directly" since, as will become apparent, Mr Hill submits that an indirect or incidental effect does not engage Article 6 and there are cases decided in the European Court of Human Rights which can be said to support that distinction.

16. Mr Hill placed much reliance on the European Court decision in Ferrazzini v Italy [2002] 34 EHHR 1068. That case concerned tax obligations and in paragraph 27 the court said this:

(a) "Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of 'public law' could come within the purview of Article 6 under its 'civil' head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages..."

17. And it then cites various authorities which support the various propositions. It continues:

(a) "Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as 'civil'..."

18. And then it refers to various cases. It continues in 28:

(a) "However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the

> National Assembly, even though in those proceedings the applicant's pecuniary interests were at stake, are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law. Similarly, the expulsion of aliens does not give rise to disputes (*contestations*) over civil rights for the purposes of Article 6 § 1 of the Convention, which accordingly does not apply..."

19. And then Maaouia v France is cited:

> (a) "29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the 'civil' sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant."

20. And it went on to decide in those circumstances that Article 6(1) did not apply. But the reason why Article 6 did not apply is because, as I have already cited from paragraph 29, tax obligations were a fundamental and general prerogative imposed on all citizens of a country. Control orders, by contrast, are not part of the hardcore of public authorities' prerogatives, to use the words of the court in Ferrazzini. Rather, they are specific and exceptional novel provisions which control the activities of individuals and prevent them from exercising all those rights which a citizen of this country generally is able to exercise. While it is not necessarily possible to regard all those rights as civil rights within the meaning of Article 6, some clearly can be so categorised. Thus, for example, the bar on travel may, and in BB's case on his evidence does, interfere with his ability to play a part in the business venture in which he is involved in Germany.

21. The main thrust of Mr Hill's submissions is that the House of Lords approach in AF (No 3), driven by the decision of the European Court of Human Rights in A v United Kingdom, a decision of 19th February of this year, was based on, in A's case, detention and, in AF's, obligations which involved significant restrictions on liberty. Thus, the application of Article 6, which was conceded and which was inevitable in those cases, does not follow where these lighter obligations are imposed. Mr Hill also, as I have indicated, submits that any effect on civil rights, assuming there is any, is merely incidental. In this submission, he prays in aid Maaouia v France [2000] 33 EHHR 1037, in which the European Court decided that Article 6 had no application to immigration controls on aliens. This, incidentally, has led SIAC, which is concerned

with removal from this country of allegedly undesirable aliens, to decide that Article 6 has no application so that the special advocate procedure can be used without the need for such disclosure as Article 6 would require. The court in Maaouia was influenced by the existence of Article 1 of Protocol 7, which provided specific guarantees applicable to the expulsion of aliens. But in paragraph 38 of the court's decision a general point was made in these words:

> (a) "In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a 'civil right' for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention..."

22. That approach has since been confirmed both in Strasbourg and in this country, most recently by the House of Lords in RB (Algeria) v Secretary of State [2009] 2 WLR 512, a case to which I shall return later. However, control orders impose obligations which are intended to restrict those subjected to them. The effect on any rights cannot therefore be said to be incidental. Indeed, if this argument prevailed, it would surely apply to all obligations imposed by control orders so that Article 6 could never be relied on. That is of course contrary to AF (No 3), to MB and to other cases in which the application of Article 6 has been accepted.

23. As has already been noted, the concession in MB did not extend to accepting that Convention rights were themselves civil rights. There are, however, strong dicta in a number of domestic cases that they are, albeit the point has never been decided as part of the *ratio decidendi* of a case. Entry, search and seizure powers do interfere with Convention rights, namely Article 8 and Article 1 of the First Protocol. Article 8(1) provides:

> (a) "Everyone has the right to respect for his private and family life, his home and his correspondence."

24. And Article 1 of the First Protocol entitles a person to peaceful enjoyment of his possessions. It can, however, be said that entry, search and seizure would otherwise be tortious and so there are private law rights which are in issue independently of Convention rights. Mr Hill submits that the obligations in these cases do not affect any rights other than Convention rights, although he suggested that they do not even create a possible breach of those rights.

25. Article 8 is breached if there is a disproportionate interference with the rights set out in 8(1). The obligations imposed do in my view interfere with the exercise by the controlees of their private lives. They are subjected to requirements, breaches of which are criminal offences carrying a maximum of five years' imprisonment. Thus they are not able to live as freely as the general population. They must report to the

police and notify the Home Office of any intended move, even for one night, from the addresses at which they are required to live. They cannot travel. While there is no right to a passport, a refusal which is not justified may be challenged by judicial review. The inability of its citizens to travel is one of the marks of a totalitarian regime which has no regard for human rights. In BB's case in particular, there is reliance, as I have said, placed on the free movement provisions of the European Union because of his business venture in Germany. It may be that those are to be regarded as civil rights, but they can equally be overridden in the interests of national security. Thus, in themselves, they provide no additional protection for the controlees.

26. There is in addition the right of association. Article 11 provides that everyone has the right to freedom of association with others. Mr Hill inevitably accepts that that right is breached unless the Secretary of State can show that the bar is necessary in the interests of national security.

27. The only other civil right which it is said to be in issue is the right to a good reputation. The European Court of Human Rights has recognised that this is a civil right within the meaning of Article 6(1). In Werner v Poland [2003] 36 EHRR 28, the court stated in paragraph 33:

> (a) "The Court sees no reason to disagree with the conclusion reached by the Commission which, moreover, coincides with the Court's own findings in the case of Tolstoy Miloslavsky v. the United Kingdom and in the case of Kurzac v. Poland that the right to enjoy a good reputation and the right to have determined before a tribunal the justification of attacks upon such reputation must be considered to be civil rights within the meaning of Article 6 § 1 of the Convention."

28. While the imposition of a control order is not an attack on the controlee's reputation, it inevitably, subject to one matter raised by Mr Hill, will have the effect of damaging it, since any who are aware of it will know that the controlee is suspected of involvement in terrorist-related activity. Mr Hill recognises this but submits that the anonymity orders provide sufficient protection to avoid this effect. But the individual's family will know and it may be difficult for him to keep it from others, if, for example, he is asked to spend a night at a friend's house or to accompany someone on a trip to the continent. In Werner's case, what led to the application to the European Court was the fact that the insolvency judge who requested the relevant court to disqualify the applicant as a liquidator, because of alleged past misconduct, then sat in the court which did disqualify him. There was thus a specific attack on Mr Werner's reputation. However, the direct effect of the control order does in my view mean that there is an attack on the controlee's reputation which he is entitled to have determined in accordance with Article 6.

29. But these other civil rights are unnecessary if Convention rights are themselves to be regarded as civil rights. As I have said, there are a number of strong dicta to the effect that they are and there are none to the contrary effect. Some judges

have reserved their opinions. The starting point is the decision of the House of Lords in Re S (Minors) [2002] AC 291. That case concerned care orders and the issue was whether the procedures relating to their imposition breached Article 8 and whether Article 6 applied. The House of Lords decided that, while there could be circumstances where there might be infringements of Article 6, they did not exist in the cases under appeal. Counsel for the appellant local authority submitted that not all Convention rights were civil rights in an Article 6 sense and that "in some circumstances the right to respect for family life under Article 8 was not a civil right under Article 6" (see page 295C to D). Mr Sales, on behalf of the Department of Health, submitted that Article 6 only applied where a domestic law right could be identified and so, since the interferences under Article 8 could take many forms, there was no necessary connection between Article 8 rights being infringed and Article 6 rights being engaged (see page 298F to G). Counsel for the parents in one of the two cases before the House submitted that every breach of Article 8 would give rise to a civil right within the meaning of Article 6 (see page 302F). Counsel for the guardian in the other case did not go quite so far, stating that civil rights and obligations overlapped with Convention rights but were not the same (see page 304A to B). Finally, in reply Mr Sales submitted that there was no necessary connection between breach of Article 8 and engagement of Article 6 and "no support for the contention that breach of Article 8 gives rise to rights under Article 6 in Strasbourg jurisprudence" (see page 305 E). He cited Maaouia in support of that proposition but, I am bound to say, I do not see how it helps in that connection.

30. Lord Nicholls gave the leading speech, with which Lords Browne-Wilkinson, Mustill and Hutton agreed, adding no reasons of their own. Lord MacKay also agreed with Lord Nicholls. He added a few observations, which are not material for the purposes of this point. Lord Nicholls dealt with the applicability of Article 6 in paragraphs 65 to 74 of his speech (pages 319 to 320 of the report). It is not necessary for me to read all those. I think I need only cite paragraphs 69 to 72, which read as follows:

> (a) "69. Thus, when considering the application of article 6(1) to children in care, the European Court of Human Rights focuses on the rights under domestic law which are then enjoyed by the parents or the child. If the impugned decision significantly affects rights retained by the parents or the child after the child has been taken into care, article 6(1) may well be relevant. It is otherwise if the decision has no such effect.
>
> (b) 70. I pause to note one consequence of this limitation on the scope of article 6(1). Since article 6(1) is concerned only with the protection of rights found in domestic law, a right conferred by the Convention itself does not as such qualify. Under the Convention, article 13 is the guarantee of an effective remedy for breach of a Convention right, not article 6(1). Article 6(1) is concerned with the protection of other rights of individuals. Thus, a right guaranteed by article 8 is not in itself a civil right within the meaning of article 6(1).

(c) 71. Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8."

31. I have cited passages from the arguments of counsel because it was apparent that the House of Lords had before it the issue, separately and variously made the subject of submissions by counsel, as to whether infringements of Article 8 themselves constituted civil rights for the purposes of Article 6(1). The suggestion that there was no argument on that point is not borne out by the report of the case.It does seem to me that, although it may be that, strictly speaking, paragraph 71 of Lord Nicholls speech may not be part of the *ratio decidendi* in the sense that it was not an essential part of the decision reached, nonetheless if it is *obiter*, it is the strongest possible *obiter* that one can imagine. Certainly the suggestion made by a number of counsel that there were limitations to the breaches of Article 8 which could amount to civil rights within the meaning of Article 6 does not find favour with the approach of Lord Nicholls, with which, as I have already said, all the other members of the committee agreed. Thus S is powerful support for the proposition that, because the Human Rights Act 1998 has provided by sections 7 and 8 a private law right to claim damages for breach of a Convention right included in the schedule in the Act, it is a civil right which engages Article 6. It is in this context to be noted that the 2005 Act, by section 11, prohibits any court from entertaining a challenge to a decision under the Act in relation to a control order. Thus the decision in section 3(10) proceedings does determine whether there is a breach of the relevant Convention right and so there is the *contestation* that the French text requires.

32. In R (McCann) v Manchester Crown Court [2003] 1 AC 787, the House of Lords considered ASBOs. The arguments related to the use of hearsay evidence, it being submitted that ASBOs imported the criminal requirements of Article 6. The House of Lords decided that proceedings leading to ASBOs were civil proceedings and so hearsay was admissible and that the trial, which was challenged, was fair and compliant with Article 6(1) insofar as it applied. Thus, the question whether a Convention right was a civil right was not directly in issue but Lord Hope at paragraph 79 of the report on page 825 said this:

(a) "At first sight an order which prohibits a person from behaving in an anti-social manner has nothing to do with his civil rights and obligations. He has no right in domestic private law to use or engage in abusive, insulting, offensive, threatening language or behaviour or to threaten or engage in violence or damage against any person or property, which are among the acts which the defendants have been prohibited from doing in the *McCann* case. But, as Lord Nicholls of Birkenhead said in In *re S (Minors) (Care Order:*

> *Implementation of Care Plan)* [2002] 2 AC 291, 320, para 71, by virtue of the Human Rights Act 1998 the right to respect for private and family life which is guaranteed by article 8 of the Convention is now part of a person's civil rights in domestic law for the purposes of article 6(1). In my opinion the same can be said of the rights to freedom of expression and of assembly and association which are guaranteed by articles 10 and 11."

33. Lord Hutton reserved his opinion on that question, see paragraph 112 on page 834. Lords Scott and Hobhouse agreed with Lord Steyn and Lord Steyn himself agreed with Lord Hope. True, one cannot necessarily read into those agreements an agreement with every word that is spoken by the fellow judge. Nonetheless, there was no qualification, save for that of Lord Hutton, to the acceptance that S had effectively decided that, because of the implementation of those rights through the Human Rights Act 1998, they amounted to civil rights within the meaning of Article 6(1).

34. Mr Hill, having submitted that the question had not been the subject of full argument in either Re S or McCann nor was part of ratio of either case, relied particularly on observations of Lord Hoffmann in the recent decision in RB (Algeria) v Secretary of State, to which I have already referred. There were two appeals considered by the House, both against decisions of SIAC dealing with removal, the issues being whether it was safe for the individuals to be removed to Algeria, despite assurances given by the Algerian authorities that they would be treated fairly if returned. Thus Maaouia applied and prima facie Article 6 would not apply, since the case concerned border control of aliens and any effect on their human rights would be incidental. In paragraph 88, Lord Phillips referred to S and said as follows:

> (a) "In *In re S (Minors)* ... paragraph 71 Lord Nicholls of Birkenhead held that the effect of the Human Rights Act was to convert Convention rights (in that case article 8) into civil rights. It would seem to follow from this that claims brought under the Human Rights Act attract the procedural standard of fairness that article 6 requires in relation to civil proceedings. For myself I have no difficulty with the argument that such a standard should apply in the case of someone who is resisting extradition or deportation on the ground that this will violate fundamental human rights. I would expect no less a standard to be required under the duty of fairness that arises at common law in relation to legal proceedings."

35. It is to be noted that Lord Phillips does not suggest that he would qualify in any way the observations of Lord Nicholls in S and the decision that Convention rights were now civil rights because of their implementation through the Human Rights Act. He appears to have gone perhaps further and recognised that Article 6 might apply to breaches, which would usually be of Article 3, which would take place if removal

occurred, that is to say breaches which would take place in the country to which the individual was removed. His reference to claims brought under the 1998 Act attracting the protection of Article 6 does not mean in my view that it would only apply where such a claim is brought. The question will surely always be whether the alleged breach is a direct effect of the action in question and so whether there is in reality a dispute which will determine whether the right has in fact been breached. As I have already said, that is the case in control orders because of section 11 of the 2005 Act. It is not the case in respect of immigration control of aliens and in RB Lord Brown makes the distinction clear in paragraph 255 on page 588, where he says this under the heading "closed evidence":

> (a) "This is not the occasion to examine the precise scope and application of *Secretary of State for the Home Department v MB and AF* — there will be a full opportunity for that on the hearing of AF's further appeal to the House in March. What is critical for present purposes is to understand the all-important difference between control orders such as were in issue there and deportation orders with which your Lordships are here concerned. The former, although falling short of constituting article 5 detention, in almost every other respect are highly restrictive of the controlees' ordinary rights and freedoms. Moreover such orders are made domestically and can be (and are) made against UK citizens no less than against aliens. (It is, of course, High Court judges alone who exercise this jurisdiction, not SIAC.) Inevitably, therefore, such orders engage article 6 of the Convention. In contrast, the expulsion of aliens involves no determination of civil rights and is therefore beyond the reach of article 6 — see the Grand Chamber's judgment in *Maaouia* ... The only exception to this (see *Chahal*) is where the alien is detained pending expulsion, not a problem now arising in either of these appeals."

36. That is a clear indication of Lord Brown's view that Article 6 does apply to Convention rights where those rights are affected by control orders.

37. In paragraph 175, Lord Hoffmann makes the point that:

> (a) "... the criterion for the ECHR in deciding whether article 6 is engaged is the nature of the proceedings and not the articles of the Convention which are alleged to be violated. If the proceedings concern deportation, article 6 is not engaged, whatever might be the other articles potentially infringed by removal to another country."

38. That of course is to apply the approach in Maaouia. Whatever safeguards are required, they are not those within the full panoply of Article 6. Mr Hill then relies particularly on what Lord Hoffmann says in paragraphs 177 and 178 on page 565 of

the report. I should cite those paragraphs. They read as follows:

> (a) "177. In *Chahal* (1997) 23 EHRR 413, however, the ECHR made it clear that the determination of whether a deportation order might infringe article 3 does not require the full judicial panoply of article 6 or even 5(4). An 'effective remedy' to protect one's rights under article 3 need not be a judicial remedy compliant with article 6. What is required, said the Court in *Chahal* (paragraph 151), is 'independent scrutiny of the claim', not necessarily by a judicial authority. The only scrutiny available at that time in the United Kingdom was by the advisory panel, which the ECHR for various reasons considered inadequate. But its commendation of the Canadian system suggests that it would have had little difficulty in accepting the SIAC procedure as adequate. I therefore agree with the reasoning of Mitting J in *OO v Secretary of State for the Home Department* (27 June 2008) and his conclusion that the SIAC procedure satisfies the requirements of article 13 for determining whether deportation would infringe an alien's rights under article 3.

39. The same is *a fortiori* true of the claims of a potential violation of articles 5, 6 and 8. It was suggested that the effect of the Human Rights Act 1998 (giving a domestic civil remedy for violations of Convention rights) was to convert all claims of infringement of Convention rights into civil rights within the meaning of article 6. If the proceedings had been an action in tort for a breach or threatened breach of article 3, they would certainly be asserting a civil right and article 6 would be engaged: compare *Tomasi v France* (1993) 15 EHRR 1 at paragraphs 120-122. Similarly for actions for violations of article 8. But these proceedings are not of that nature. They are to challenge the validity of deportation orders. As I have said, it is the nature of the proceedings which decides whether article 6 is engaged or not."

40. Those observations must of course be read in context, namely the non-applicability of Article 6 to deportation. In fact, in the first sentence of 178 Lord Hoffmann talks of a potential violation of Article 6 and a potential violation of Article 6 can only arise if it does, as a general proposition, apply to Convention rights implemented through the Human Rights Act. So he is not saying anything which in any way is contrary to what Lord Nicholls said in S. But in deportation cases, of course, the potential violation of the articles in question will be incidental. Lord Hoffmann recognises that Article 6 will be engaged for actions in violation of Article 8 or clearly any other article which might apply. The nature of the proceedings in these cases does in my view engage Article 6 because the control orders, as I have said, are intended to, and do, restrict the rights of the individuals who are subjected to them. Thus I do not think that Lord Hoffmann's observations assist Mr Hill and there exists just as much in respect of what otherwise would be tortious acts in relation to search and seizure private law rights to claim damages if breaches of other rights are established.

41. Accordingly, in my judgment, Article 6 does apply and it requires that the hearing be fair. Mitting J's views in BM v Secretary of State for the Home Department [2009] EWHC 1572 (Admin) are relied on by Mr Hill. He cites paragraph 3 of Mitting J's judgment, in which he is said to draw a distinction between Convention rights and civil rights for the purposes of Article 6:

> (a) "Miss Rose QC for BM submits that his appeal against the modification determines his civil rights and obligations in three respects: his right to respect for family life under Article 8 and to access to his children; the state-imposed obligation on where he is to live; and his right to occupy either or both of the homes in Ilford at which he resided before 21st May 2009. The first two grounds are open to debate. The right to respect for family life is a Convention, not a civil right, although it may include a package of civil rights. One of them may be the right of access to children by a parent: *W v United Kingdom* [1987] 10 EHRR 29 paragraph 78. But the modification challenged does not deprive BM of access to his children. For an uncertain period likely to be counted in weeks, it may make access more difficult; but if the Secretary of State locates a suitable family home away from Ilford and BM's wife and children choose to live in it with him, his right of access to his children will be unimpaired. Even if that were not to happen, his appeal against the modification does not determine his right of access to his children. At most, it may have a partial indirect effect upon it. That would be insufficient to engage Article 6(1). The obligation to reside at a particular address, imposed for reasons of national security, is not obviously a civil obligation, except in the sense that it is not imposed by, or in consequence of, an order of a court exercising criminal jurisdiction. My provisional view – I have not heard full argument upon the question – is that it falls within the 'hard core of public authority prerogatives' identified in *Ferrazzini v Italy* (2002) 34 EHRR 1068 as falling outside the scope of civil rights and obligations."

42. His views were, as he recognised, provisional and formed without hearing argument. I am afraid, for the reasons that I have given, I do not accept them, insofar as they conflict with what I have already stated.

43. This leads me to Mr Hill's alternative argument that, assuming Article 6 to apply, a different balance should be struck because of the light nature of the obligations. It would perhaps be unfair to him to categorise this as a submission that a lesser degree of fairness is required depending on the seriousness of the restrictions, but it seems to me to come somewhat close to that. One must, I think, recognise that obligations to report to the police daily, to remain at a particular address unless at least 48 hours notice is given to the Secretary of State in advance of any, even an

overnight, move and a prohibition on travel are serious for the individual. That is added to by the effect of being labelled, in the sight of others, a terrorist.

44. Mr Hill draws attention to various observations of eminent judges which he submits indicate that the standards of procedural protection afforded under Article 6 are flexible. Thus, in Brown v Stott [2003] 1 AC 681 at page 104D to E, Lord Bingham says this:

> (a) "The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the Court throughout its history. The case law shows that the Court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v. Sweden* (1982) 5 EHRR 35, at paragraph 69 of the judgment; *Sheffield and Horsham v. United Kingdom* (1998) 27 EHRR, 163, at paragraph 52 of the judgment."

45. That case concerned the requirement of a motorist to identify the driver of a car at a material time which was or could be self incriminatory. It was in that context that Lord Bingham's observations were made. But it is necessary to consider the circumstances of an individual case. Here the question is whether it could be fair if a controlee is unable to know and so to give instructions to his representatives to enable them to deal with material relied on against him which is said to establish the need for a control order and for any particular obligation in that order. There can, in my judgment, be only one answer to that, certainly since the decisions of the European Court in A and the House of Lords in AF (No 3), namely that he must be told enough to enable him to meet the case against him. What is sufficient will, of course, depend upon the facts of a given case and I note that the special advocates have said that there are submissions that they will in due course be making if, or when, this 3(10) hearing is to continue, which are specific and which should lead to further disclosure requirements.

46. Mr Hill submits that A and AF were concerned with detention in A's case and much more severe restrictions in AF's case. He prays in aid the approach of the Court of Appeal in R (AHK) v Secretary of State for the Home Department [2009] 1 WLR 2049. That case, decided before AF (No 3) concerned a refusal of citizenship and whether a special advocate had in the circumstances to be appointed. The court sets out the appropriate approach to this question at page 2062-3, paragraph 37. So far as material, this reads:

> (a) "We now first set out the principles which it appears to us should be adopted and then explain the reasons for some of them in the light of the submissions which were made to us.
>
> i) The general principles are that a person whose application for citizenship is refused is entitled to be told the reasons for the decision to refuse and that a claimant who challenges a refusal to grant British nationality on the grounds set out above is entitled to see all the material which the Secretary of State considered when reaching her decision and/or upon which she relies, whether favourable or unfavourable to the applicant.
>
> ii) There are some exceptions to those general principles. They apply or, depending upon the circumstances, may apply to a case in which the Secretary of State (a) refuses an application for British nationality on the ground that she is not satisfied that the applicant is of good character and (b) refuses to disclose to the applicant for judicial review some or all of the material upon which she relied ('the material') and/or refuses to give any, alternatively any further, reasons on public interest grounds, including in particular on the ground that to do so would put national security at risk.
>
> iii) In case (b), the Secretary of State should consider with counsel, who should consider the issue dispassionately, whether it is appropriate for the trial judge to have the assistance of a special advocate.
>
> iv) The principles to be borne in mind are these:
>
> a) A special advocate should be appointed where it is just, and therefore necessary, to do so in order for the issues to be determined fairly.
>
> b) Where the material is not to be disclosed and/or

full reasons are not to be given to the claimant there are only two possibilities: (a) that the judge will determine the issues, which may include or be limited to issues of disclosure, by looking at the documents himself or herself or (b) that he or she will do so with the assistance of a special advocate.

c) The appointment of a special advocate is, for example, likely to be just where there may be significant issues and/or a significant number of documents. The position may be different where there are very few documents and the judge can readily resolve the issues simply by reading them.

d) All depends upon the circumstances of the particular case, but it is important to have in mind the importance of the decision from the claimant's point of view, the difficulties facing the claimant in effectively challenging the case against him in open court and whether the assistance of a special advocate will or might assist the claimant in meeting the Secretary of State's case and the court in arriving at a fair conclusion.

e) These principles should not be diluted on the grounds of administrative convenience."

47. On page 2068, at paragraph 45, this is said:

(a) "The above analysis shows that the ECtHR considers each class of case separately. The issues in this class of a case are a far cry from the issues which arise in the criminal cases discussed by the ECtHR in *A* (on 19th February 2009). Moreover, without in any way minimising the effect of being refused British citizenship, the consequences of a deprivation of (or even interference with) liberty are plainly very much more serious. In these circumstances we do not think that the approach of the ECtHR in criminal cases or in cases of deprivation or interference with liberty can or should be applied directly to this class of case. That is not to say that, as explained earlier, each individual is not entitled to a fair hearing of his application for judicial review. It is indeed to precisely that end that we have tried to devise a fair procedure in this type of case."

48. They then say that A does not in their view change that and then in paragraph 47 they continue:

> (a) "Those conclusions are subject to this. We recognise that, albeit in a different context, in trying to arrive at a fair balance between the parties, the ECtHR naturally places importance on the individual being told the gist of the case against him, even if he cannot be told it all and cannot be given relevant documents. It does appear to us that the less information given to the individual the more likely it is that the judge will conclude that the individual should have the benefit of the assistance of a special advocate."

49. It was assumed by the court that the special advocate procedure would provide the necessary safeguards and so comply with the requirement of fairness. It is incidentally far from clear that Article 6 is applicable in citizenship cases since no civil right is at stake. Thus the observations in AHK were concerned more with overall fairness in a domestic law context and it may well be that disclosure to the extent required to comply with Article 6 is not necessary in such a case. But, assuming AHK is relevant to a consideration of the requirements of fairness under Article 6, the decision in AF makes clear that the appointment of a special advocate will not necessarily produce the required degree of fairness. The special advocate can only be of use if he is able to make an effective challenge to the important material and he can only do that if the controlee knows enough to give the necessary instructions.

50. It is, of course, true that A and AF did concern more severe restrictions. The essence of the decision of the European Court in A is set out in Lord Phillips' speech in AF at paragraph 59:

> (a) "Contrary to Mr Eadie's submission, I am satisfied that the essence of the Grand Chamber's decision lies in paragraph 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

51. That, as it seems to me, is clearly the ratio of AF (No 3) and it is not, on the face of it, limited to any particular nature of the requirements of a control order. However, Mr Hill relies on two passages in Lord Phillips' speech. First of all, paragraph 57, where

he said this:

> (a) "The requirements of a fair trial depend, to some extent, on what is at stake in the trial. The Grand Chamber [in A] was dealing with applicants complaining of detention contrary to article 5(1). The relevant standard of fairness required of their trials was that appropriate to article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that article 5(4) imported the same fair trial rights as article 6(1) in its criminal aspect - see paragraph 217. Mr Eadie submitted that a less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg Court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial. Were this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases."

52. The less stringent standard was in the context of the distinction between Article 6 in its criminal and in its civil application and it was recognised that the civil standard might, in given cases, be less stringent than the criminal standard. But it is noteworthy that Lord Phillips recognises the possibility of that distinction, where the restrictions fall far short of detention, and I underline the word "far", but he goes on to recognise that Strasbourg would not draw any distinction when dealing with the minimum disclosure necessary, and what I think is apparent from A and from AF applying A is that there is an irreducible minimum and that irreducible minimum is set out by Lord Phillips in paragraph 59 and incidentally agreed to by Lord Hope in paragraph 80. Lord Hope does not suggest that there is room for any qualification. However, in 65, Lord Phillips said this:

> (a) "Before *A v United Kingdom*, Strasbourg had made it plain that the exigencies of national security could justify non-disclosure of relevant material to a party to legal proceedings, provided that counterbalancing procedures ensured that the party was accorded 'a substantial measure of procedural justice' - *Chahal v United Kingdom* (1996) 23 EHRR 413, at para 131. Examples were cited by the Grand Chamber in *A v United Kingdom* at paras 205-208, covering the withholding of material evidence and the concealing of the identity of witnesses. The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."

53. It is those last words that Mr Hill particularly relies on, because they, on the face of them, may appear to recognise the possibility of a lesser standard, even in relation to disclosure. How those fit with what Lord Phillips said in paragraph 57 is not entirely clear. But, the important qualification, as I see it, is that there is that irreducible minimum and, whatever may be the variation in standard, it can never fall below that minimum which I have already referred to in paragraph 59.

54. Of course, it is also necessary to consider what Lord Phillips meant by "severe". I have already indicated that on one view the restrictions, even those said to be light in the circumstances of this case, can be regarded as severe. What is clear is that it will be very difficult for any judge to assess where the line should be drawn and whether it has been crossed in relation to disclosure in any given case. As I have said, the reality is that there is a minimum and I do not think Lord Phillips was intending by the words in paragraph 65 to qualify that. That is supported, as I have already said, by what Lord Hope said in paragraph 80, by what Lord Scott said in paragraph 96 and it is worth, I think, also noting what Lord Brown said in paragraphs 115 to 116, and I quote:

> (a) "115. The essence and effect of the Grand Chamber's decision in A can be comparatively shortly stated. It comes to this:
>
> 2. Although in the past — in cases like *Chahal* [and others] - the Court has contemplated the use of special advocates as a means of counterbalancing procedural unfairness and thereby satisfying the requirements of articles 5(4) and 6, it has never previously actually decided the point — paras 209 and 211.
>
> 3. Special advocates can provide an important safeguard in ensuring that the fullest possible disclosure is made to the suspect as is consistent with the public interest (para 219). However, the special advocate cannot usefully perform his important role of 'testing the evidence and putting arguments on behalf of the [suspect]' unless the suspect is 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate' (para 220, second sentence).
>
> 4. 'Where ... the open material consist[s] purely of general assertions and [the judge's] decision [to confirm the control order is] based solely or to a decisive degree on closed material, the procedural requirements of [article 6 will] not be satisfied.' (para 220, last sentence)
>
> 5. This is so despite the Court's express recognition (a) that there is 'a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information' (para 216) and (b) that no excessive or unjustified secrecy is employed; rather there are 'compelling reasons for the lack of disclosure' (para 219).

55. In short, Strasbourg has decided that the suspect must always be told sufficient of the case against him to enable him to give 'effective instructions' to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk."

56. There is no qualification in those observations of Lord Brown and a recognition that in A, and so their Lordships in AF applying A, have set out what is a minimum requirement in respect of disclosure in cases such as this.

57. I have no doubt that the decision in AF compels me to decide that the approach to disclosure is the same for any control order. Of course, what may be needed to be disclosed in the individual case will vary, but, as I have said, there is the irreducible minimum and so the suggestion that, where the restrictions are said to be light or not severe (however this is to be judged), the approach set out in MB or the mere existence of the special advocate will suffice is not to be applied.

58. It follows that I reject the arguments put forward by Mr Hill. It seems to me that the imposition of what are described as light obligations in order to seek to avoid the application of Article 6 does not achieve that result, nor does it avoid the need for the controlled person to know sufficiently the important allegations against him to make a defence to them. It is obvious that the allegations in this case go to the suggestion that they should not be allowed to travel abroad because they will engage in terrorist-related activities of one sort or another whilst abroad. There are obviously arguments which will be raised no doubt in closed, as to the extent of disclosure which is needed in order to enable those allegations to be understood and to be met. Furthermore, there is the association with the third person named in BC's case. He says that he has never heard of that individual. It is pointed out that that may be because he knows him under a different name. It may be that he has spoken to that individual but was not aware of who he was, it was a conversation which was about nothing of importance. There may be other reasons why, if he knows the circumstances in which that association took place, he may be able to refute it, but he asserts that he needs to know considerably more. Whether that will in due course require further disclosure will be a matter, of course, for consideration, no doubt, as I say, in closed. But it is obvious that there are arguments to be raised which will assert that further disclosure is needed.

59. MR O'CONNOR: My Lord, I am grateful. Your Lordship has delivered a lengthy and detailed judgment, which those behind me will plainly wish to consider with care, in particular once the transcript has become available.

60. MR JUSTICE COLLINS: I have had a word with the shorthand writer. He tells me that he will this afternoon try to produce the transcript. I am in slight difficulties because I am not sure what my movements are going to be over the next couple of days, but certainly you will have it by the beginning of next week at the latest, by Monday. I hope that is sufficient. I mean, you have obviously been able to take a note, so you know broadly what I have said.

61. MR O'CONNOR: We have, my Lord, and, on the basis of what we have heard from you today, I do have instructions to make two applications to you now, which are related. The first is for permission to appeal.

62. MR JUSTICE COLLINS: Well, that you will have. I do not imagine there is any objection to that.

63. MR SOUTHEY: My Lord, I think I would have great difficulty persuading your Lordship otherwise, although can I make it clear that, and this may be relevant to what we say later, that is not necessarily because we would accept that an appeal has any real prospects of success.

64. MR JUSTICE COLLINS: No, but the issue is -- it is the other aspect of an appeal, namely that it is of considerable importance and, indeed, if I had gone the other way, you clearly would have applied for leave to appeal yourselves.

65. MR SOUTHEY: Yes, absolutely.

66. MR MOLONEY: The same position, my Lord.

67. MR JUSTICE COLLINS: So you have leave to appeal.

68. MR O'CONNOR: I am grateful, my Lord. The second application, which I believe Mr Southey may resist, is an application for these section 3(10) proceedings to be adjourned to enable us to pursue that appeal.

69. MR SOUTHEY: My Lord, that is correct. I did warn my learned friend Mr O'Connor this morning that we had been considering what action essentially should be taken in relation to the existing control order proceedings and the way we put our case, and it may be, and I said to Mr O'Connor that we recognise that this may be necessary, it may be necessary that Mr Hill had an imput into this, and so it may be that your Lordship would wish--

70. MR JUSTICE COLLINS: Well, Mr Southey, what I think -- what I will be prepared to do is this: to say wait and see what they decide to do. If they -- because they may decide, for example, I am not suggesting they will, but they could decide to revoke the control orders, in which case, obviously, any application by you would be not needed. But I think it is probably more sensible to wait to see whether they are going to pursue an appeal before making any decision on whether, in those circumstances, there should be an adjournment. What I would say is that, when you know what they are going to do, which I suspect will be next week, then it will be open to you to make any submission that you wish to make on the future possible conduct of the 3(10) hearing.

71. MR SOUTHEY: I mean, in summary, just so everyone is aware, because it may assist my learned friend, the point that we would make is that in relation to the 3(10) hearing the jurisdiction of the court fundamentally is to determine whether or not the control order is flawed, made on a flawed basis, applying judicial review principles, and, although I recognise that is expanded upon --

72. MR JUSTICE COLLINS: Well, that does not mean what Parliament intended it to mean.

73. MR SOUTHEY: No, it does not, but it does include what Parliament intended it to mean and certainly that was the approach of Mitting J, that is why I handed up AW. In which case, it is clear -- the decision making is set out in paragraph 34, certainly of BC's control order -- that the decision making process here was that these were obligations which could be imposed without AF applying. That was expressly said.

74. MR JUSTICE COLLINS: Yes. That was what the Secretary of State hoped.

75. MR CORY-WRIGHT: Absolutely, but that would mean that, on classic public law grounds, the decision was flawed, because it was based on a misdirection.

76. MR JUSTICE COLLINS: Yes, but if they are going to appeal then my decision may be overturned and, of course, the practical result is that, on my decision, there will have to be quite clearly a further rule 29 hearing and -- so to that extent, in any event, the 3(10) hearing is bound to be adjourned for a time, is it not?

77. MR SOUTHEY: Well, except, and this is why I handed up the AW case, in AW what had happened was that there was a flawed decision making process, in that what had happened was that the Secretary of State had been misled, or Mitting J held the Secretary of State had been misled, in terms of the submissions that had been made, and the action he took, resisted by the Secretary of State, was to quash the control order, recognising, as indeed happened, that an immediate fresh control order might be made, but recognising that that was then being made by the Secretary of State on the correct legal basis --

78. MR JUSTICE COLLINS: Mr Southey, this is, with respect, an entirely different situation. The only question here is whether there has to be further disclosure in order to enable the Secretary of State to maintain the control order. There is no question of any failure to approach the matter in the correct fashion. It is obviously dependent upon the decision of the Court of Appeal -- although Lady Hale and Lord Brown would be mortified in going further, I know not -- but the reality surely is that we know, because the special advocates have indicated, and indeed it is obvious, that there are going to be arguments raised in closed as to whether there ought to be further disclosure. Now, those arguments clearly would be otiose if I am wrong. Now, it is important clearly that the Court of Appeal reaches a decision, if there is to be an appeal, as quickly as possible. I have already said, I have had words with the Lord Chief Justice and impressed upon him, and I will do so again, and the Master of the Rolls, the need for this to be decided quickly, because obviously there are many potential -- when I say many, one imagines there are other potential orders which may be affected and also, of course, it may to a degree dictate the approach which the Secretary of State decides to take, or the Government generally, to see how they can deal with the threat of terrorism which is, they say, produced by various individuals who need to be controlled at the moment. So it has a very important knock on affect, has it not?

79. MR SOUTHEY: My Lord, I do not think there is anything else. I raise the issue but --

80. MR JUSTICE COLLINS: Well, at the moment I am against you, but, as I say, I will leave it to you to, if you wish, make any submissions when you know what the Secretary of State is going to do. I suggest that initially they are made in writing.

81. MR SOUTHEY: Yes, I was going to suggest that.

82. MR JUSTICE COLLINS: And we wait and see.

83. MR SOUTHEY: My Lord, the other issue that I should raise is a perhaps much more straightforward issue, which is the issue of costs.

84. MR JUSTICE COLLINS: Reserved, I think, because this is an interlocutory decision.

85. MR SOUTHEY: It is, although clearly a considerable amount of effort has been put on this issue.

86. MR JUSTICE COLLINS: You say -- I suppose I could say you have your costs in any event of this issue. Essentially you have won this issue, so I suppose -- you are legally aided?

87. MR CORY-WRIGHT: We are, yes.

88. MR JUSTICE COLLINS: Yes, I think perhaps -- but no application of that will be made pending any question of appeal. I am prepared, subject to Mr O'Connor, to make the order in your favour but to put a stay on it, pending the decision of the Court of Appeal.

89. MR SOUTHEY: My Lord, the other matter in relation to costs, I mean --

90. MR JUSTICE COLLINS: You want your usual legal aid taxation.

91. MR SOUTHEY: Well, there is a third, which is we have never resolved the issue of the costs of the control order that was revoked, the proceedings in relation to that.

92. MR JUSTICE COLLINS: Well, I am slightly disinclined to deal with that today, because it something that has not been raised, I think, with Mr O'Connor. Can I suggest that initially, again, you make submissions on that in writing and we will decide whether there is any need for an oral hearing in due course.

93. MR MOLONEY: Would your Lordship say for the avoidance of doubt that the same order as to costs applies to --

94. MR JUSTICE COLLINS: Yes. I have not heard you on --

95. MR O'CONNOR: As far as the inter partes costs of this issue are concerned, we accept the principle that the other side should bear costs, subject to the --

96. MR JUSTICE COLLINS: I think that must follow, but the stay will obviously --

97. MR O'CONNOR: My Lord, so far as the costs of the previous proceedings are concerned, those proceedings are not at least technically before you. May I suggest that the very first course might be, rather than submissions being put in to the court, that those on the other side simply write to the Secretary of State, to the Treasury Solicitor, and the matter may be capable of being dealt with in correspondence.

98. MR JUSTICE COLLINS: Of course. That goes without saying.

99. MR CORY-WRIGHT: My Lord, may I raise one matter? Your Lordship obviously referred, both during the course of your judgment and in the debate that has taken place afterwards, to the fact that there are outstanding issues on disclosure as far as the special advocates are concerned. May I, for the record, as it were, recite what we discussed last time.

100. MR JUSTICE COLLINS: Yes, maybe I have not made -- I did not make a careful enough note of what --

101. MR CORY-WRIGHT: Well, it is a very simple point, my Lord. On the Secretary of State's alternative submission, that a lower level of fairness applies, the Secretary of State was making the point that it is context specific and therefore you need to look at the particular circumstances. Were the Court of Appeal to be attracted by that argument at all, it would be relevant, we would suggest, to know the precise factual context, including that which is in closed and that which is in open.

102. MR JUSTICE COLLINS: Well, Mr Cory-Wright, that, with respect, is a matter that can be raised before the Court of Appeal. It is not really a matter on my findings for me.

103. MR CORY-WRIGHT: No, my Lord, I was not asking your Lordship to make any findings about it. I was simply wanting to make it clear that that is the position.

104. MR JUSTICE COLLINS: It will be on the transcript.

105. MR CORY-WRIGHT: Thank you, my Lord.

106. MR JUSTICE COLLINS: All right. OK, that is all, is it not? Many thanks.