Trinity Term
[2011] UKSC 35
On appeal from: [2010] EWCA Civ 462

JUDGMENT

Home Office (Appellant) *v* Tariq (Respondent)

Home Office (Respondent) *v* Tariq (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Mance
Lord Kerr
Lord Clarke
Lord Dyson

JUDGMENT GIVEN ON

13 July 2011

Heard on 26 and 27 January 2011

Appellant
James Eadie QC
Catherine Callaghan
(Instructed by Treasury Solicitors)

Respondent
Robin Allen QC
Paul Troop
(Instructed by Russell Jones & Walker Solicitors)

Appellant
Robin Allen QC
Paul Troop
(Instructed by Russell Jones & Walker Solicitors)

Respondent
James Eadie QC
Catherine Callaghan
(Instructed by Treasury Solicitors)

Special Advocate

Judith Farbey QC

(Instructed by Special Advocates Support Office)

Interveners (JUSTICE and Liberty)
John Howell QC
Naina Patel
(Instructed by Herbert Smith LLP)

LORD MANCE

Introduction

1. This appeal concerns the permissibility and in particular compatibility with European Union law and Human Rights Convention rights, of a procedure (conveniently described as a “closed material procedure”) whereby an applicant and his representatives may be excluded from certain aspects of employment tribunal proceedings on grounds of national security, and a special advocate may represent his interests so far as possible in relation to the aspects closed to him and his representatives.

2. In the relevant employment tribunal proceedings, the appellant, Mr Kashif Tariq, complains that his security clearance as an immigration officer was withdrawn in circumstances involving direct or indirect discrimination on grounds of race and/or religion, and that this was contrary to the Race Relations Act 1976 and the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660). The Home Office’s case is that there was no such discrimination, that the decisions taken in relation to Mr Tariq were taken for the purposes of safeguarding national security, and that the order for a closed material procedure made by the Employment Tribunal (on the Home Office’s application) on 15 February 2008 was made justifiably and for the same protective purposes.

3. Mr Tariq’s challenge to the Employment Tribunal’s order for a closed material procedure was dismissed by the Employment Appeal Tribunal on 16 October 2009, UKEAT 168/09, [2010] ICR 223 and the Court of Appeal on 4 May 2010 [2010] EWCA Civ 462, [2010] ICR 1034, but it was declared (by the Employment Appeal Tribunal’s order dated 24 November 2009, upheld in the Court of Appeal) that article 6 of the European Convention on Human Rights “requires [Mr Tariq] to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively” (a requirement which can conveniently be described as “gisting”), even if this put the Home Office “in the invidious position of having to make difficult decisions about disclosure and whether or how a claim is to be defended”: [2010] ICR 1034, para 50, per Maurice Kay LJ. The Home Office appeals to the Supreme Court against the latter conclusion, while Mr Tariq cross-appeals against the conclusion that a closed material procedure was permissible.

The factual background in more detail

4. Mr Tariq started employment with the Home Office as an immigration officer on 21 April 2003, having received the necessary security clearance on 18 February 2003. On 19 August 2006 he was suspended from duty on basic pay, while consideration was given to the withdrawal of his security clearance, and on 20 December 2006 his clearance was withdrawn. His internal appeal against this decision was dismissed on 9 August 2007, and his further appeal to the Security Vetting Appeals Panel ("SVAP") was unsuccessful in January 2011.

5. The background to the Home Office's decisions to suspend and withdraw Mr Tariq's security clearance consists in the arrest of his brother and cousin on 10 August 2006 during a major counter-terrorism investigation into a suspected plot to mount a terrorist attack on transatlantic flights. Mr Tariq's brother was subsequently released without charge. Mr Tariq's cousin, Tanvir Hussain, was convicted on 8 September 2008 of conspiracy to murder, having previously also pleaded guilty to two counts of conspiracy to cause explosions and to commit a public nuisance. He is now serving a sentence of life imprisonment. Inquiries were made at the time of the arrests to establish whether or not Mr Tariq was involved in any way with the plot or could be affected by it. No information suggested that Mr Tariq had himself been involved in any terrorism plot, but the Home Office (in "grounds of resistance" served in the Employment Tribunal proceedings on 6 August 2007 and amplified on 20 December 2007) states that it was concerned in August 2006 "that [Mr Tariq] could be vulnerable to an approach to determine if terrorist suspects had been flagged to the authorities or to smuggle prohibited items airside" and that its decision to withdraw security clearance in December 2006 was "based on [his] close association with individuals suspected of involvement in plans to mount terrorist attacks" and on its view that association with such individuals might make him "vulnerable to attempts to exert undue influence on [him] to abuse his position".

6. Mr Tariq commenced the employment tribunal proceedings claiming direct or indirect discrimination on grounds of race and/or religion on 15 March 2007. He stated at the outset that he had been advised that his suspension and the withdrawal of his security clearance were because of his perceived association with certain relatives or associates of relatives suspected of association with terrorist activities and the risk of their attempting to exert influence on him to abuse his position. He denied any such association or risk. On 10 July 2007 he provided what he said were (considering, he said, the "extremely limited information as to the grounds for his treatment" to that date given) the best further particulars possible to give pending disclosure by the Home Office. These particulars alleged, inter alia, that the Home Office had relied upon stereotypical assumptions about him and/or Muslims and/or individuals of Pakistani origin such as susceptibility to undue influence, coercion or "brainwashing" and had indirectly discriminatory security

policies, procedures and methods of investigation. The Home Office in its grounds of resistance denied this and maintains, as stated, that it acted throughout to protect national security.

The legislation

7. The Race Relations Act 1976 provides:

"**1 Racial discrimination**

(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; ...

(lA) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (lB), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but-

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,

(b) which puts or would put that other at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

….

42 Acts safeguarding national security

Nothing in Parts II to IV shall render unlawful an act done for the purpose of safeguarding national security if the doing of the act was justified by that purpose."

The Race Relations Act 1976 is the means by which the United Kingdom gives effect to its obligations under Council Directive 2000/43/EC of 29 June 2000 ("the Race Directive") implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

8. On 27 November 2000 Council Directive 2000/78/EC ("the Employment Equality Directive") established a general framework for equal treatment in employment and occupation. This led to the making, under section 2 of the European Communities Act 1972, of the Employment Equality (Religion or Belief) Regulations 2003 ("the Employment Equality Regulations"), prohibiting discrimination on grounds of religion or belief and providing:

"3.—(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if—

(a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but—

(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

….

Exception for national security

> 24. Nothing in Part II or III shall render unlawful an act done for the purpose of safeguarding national security, if the doing of the act was justified by that purpose."

The issues regarding closed material procedure in more detail

9. Employment Tribunals are established under the Employment Tribunals Act 1996. Section 7 entitles the Secretary of State to make "by regulations ('employment tribunal procedure regulations') …. such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals". Section 10, which I set out in the annex to this judgment, specifically authorises the making in the interests of national security of regulations providing for a closed material procedure, either by direction of a minister or by order of the employment tribunal or judge, and for the appointment by the Attorney General in that context of a special advocate.

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) contain in Schedules 1 and 2 provisions made under sections 7 and 10 of the Act. Schedule 1, headed the Employment Tribunals Rules of Procedure ("the ET Procedure Rules"), contains rule 54, set out in the annex, providing specifically for a closed material procedure where a minister so directs (rule 54(1)) or where the tribunal or employment judge concludes that such a procedure is appropriate and so orders (rule 54(2)). Schedule 2, headed the Employment Tribunals (National Security) Rules of Procedure ("the ET National Security Rules"), contains rules 8 and 10, also set out in the annex, providing for special advocates and reasons in national security proceedings. Regulation 16 provides that the rules in Schedule 1 apply to employment tribunal proceedings generally, but that such rules shall be modified in accordance with Schedule 2 wherever any power conferred on the minister, the tribunal or an employment judge by rule 54 of Schedule 1 is exercised. Regulation 2 of the 2004 Regulations contains definitions, again set out in the annex.

Mr Tariq's cross-appeal – (a) general

11. The power to give directions conferred on the minister by rule 54(1) has not been exercised in this case. The Supreme Court was told that it has never been exercised in any case. The probable reasons are not difficult to discern, bearing in mind the scope for challenge both by judicial review and, more fundamentally, under the Human Rights Act 1998 or, Mr Robin Allen QC also submits for Mr Tariq, European Union law. While the conferral of the power is expressly authorised by the 1996 Act, it is hard to see how it could be compatible with article 6 of the European Convention on Human Rights for a minister to have power to

make such a direction to a judicial tribunal. Instead of giving any direction, the minister made an application to the tribunal, asking it to order a closed material procedure with a special advocate under the discretionary power conferred by rule 54(2). On 15 February 2008, the tribunal held that it was expedient in the interest of national security to make orders under rule 54 that the whole of the proceedings be in private, and directed that Mr Tariq and his representative should be excluded from part of the proceedings when closed evidence and/or documents were being considered, that the Tribunal would consider both open and closed documents and that the Home Office would make available the appropriate closed material to any special advocate appointed. It further stated that the terms so ordered would be reviewed at a later case management discussion. At a case management discussion held on 30 May 2008, in the presence of representatives of the parties and of Ms J Farbey of counsel nominated by the Attorney General to act as special advocate, the judge ordered that her role as special advocate should take effect and that she should proceed in discussions with Mr Tariq.

12. Meanwhile, reasons for the tribunal's decision on 15 February 2008 were outstanding. The minister, to whom the tribunal was required by rule 10 of the ET National Security Rules to submit such reasons in the first instance, directed that one paragraph be abridged and another omitted. As a result, an edited version, identifying the positions of the amendment and abridgement, was initially issued to Mr Tariq and his representatives on 15 October 2008. However, on 9 December 2008 the full reasons were released. One may speculate that this resulted from submissions made by the special advocate. The paragraphs amended and omitted do not, on their face, seem likely to impact on national security. This course of events offers therefore a cautionary message, but, quite possibly also, an indication of at least one purpose which a special advocate may serve. In the upshot, there is not now any ministerial order in effect under rule 10. Whatever objections may be made to a rule giving the executive power to direct the judiciary with regard to reasons do not therefore arise for consideration on this appeal. This appeal concerns an exercise by the Tribunal of its power under rule 54(2) of the ET Procedure Rules, read with rule 8 of the ET National Security Rules.

(b) The European Union Directives

13. On behalf of Mr Tariq, Mr Allen submits that rule 54(2) and rule 8 are contrary to European Union law and/or the European Human Rights Convention. These rules were made pursuant to the express statutory authority to make such rules conferred by section 10 of the Employment Tribunals Act 1996. Mr Allen's first submission is that they are, none the less, in conflict with European legal principles governing discrimination, contained in the European Treaties and in the Race and Employment Equality Directives, to which the 1996 Act, the Race Relations Act 1976 and the Employment Equality Regulations must all be read, at least as far as possible, as being subject.

14. Mr Allen notes in this connection a contrast between the two Directives. The Employment Equality Directive makes express reference to national security, providing in article 2(5):

> "5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."

There is no equivalent provision in the Race Directive. Mr Allen suggests that this may be because the Race Directive does not preclude discrimination on grounds of nationality: article 3(2). Mr Allen further notes that neither Directive makes express provision for closed hearings, and that the Court of Justice has on more than one occasion made clear that the European Treaties contain no general power for states to derogate from European law and the rights it confers on grounds of public safety or national defence, outside specific situations identified in Treaty articles, none of which applies here: Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] QB 129; Case C-337/05 *Commission of the European Communities v Italian Republic* [2008] ECR I-2173.

15. None of these points is, in my view, relevant in the present context. I agree with the reasoning and conclusions of Maurice Kay LJ in paras 12 to 22 of his judgment in the Court of Appeal: [2010] ICR 1034. The authorities cited by Mr Allen deal with derogation from principles of substantive law, here the rights not to be discriminated against conferred by the Directives. The legitimacy of closed hearings and of the use of a special advocate are matters of procedural law. Procedure is primarily a matter for national law. It is, however, a basic principle of European Union law that national law should provide effective legal protection, by establishing a system of legal remedies and procedures which ensure respect for the relevant right: Case C-312/93 *Peterbroeck v Belgian State* [1995] ECR I-4599; Case C-432/05 *Unibet (London) Ltd v Justitie-Kanslern* [2007] ECR I-2271. In that respect, European Union law directs attention primarily to principles established under articles 5 and 6 of the European Convention on Human Rights as a guide to what constitutes effective legal protection.

16. Mr Allen points out that the Directives both contain provisions (article 7(1) of the Race Directive and article 9 of the Employment Equality Directive), whereby:

> "Member states shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation

> procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

Further, by articles 8 and 10 respectively of these Directives:

> "Member states shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

Again, and as this wording contemplates, it is for each national judicial system to ensure an effective system of legal procedures enabling a claimant to establish facts from which it may be presumed that there has been direct or indirect discrimination. In the present case, Mr Allen has not suggested that Mr Tariq has not been able to do this.

17. Mr Allen also submits that Mr Tariq could lose his claim by reason of section 42 of the Race Relations Act 1976 and/or regulation 24 of the Employment Equality Regulations on a basis which, by reason of the closed material procedure, would not be disclosed. Section 42 and regulation 24 are dealing with substantive law. If they were read and applied as excusing what would otherwise be unlawful discrimination, they might therefore be open to challenge under the principle of European Union law identified in para 14 above. But the present case is far from involving any such issue. First, the issue could only arise from a substantive decision, and the Tribunal is a long way from reaching such a decision. Second, it is far from clear that section 42 and regulation 24 are to be read as entitling a tribunal or court to excuse what would otherwise be unjustified discrimination on grounds of national security. The question would arise: if it would involve unjustified discrimination, how could "the doing of the act" be justified for the purpose of safeguarding national security? Third, the Home Office's dominant aim in the present proceedings is to show that there was no discrimination at all on any prohibited ground, but a rational and proportionate decision taken in the public interest. If the Employment Tribunal were at some future stage to find that there was discrimination on a prohibited ground, but that the effect of section 42 and/or regulation 24 was that such discrimination could none the less be regarded as justified as being for the purpose of safeguarding national security, the Tribunal

would be obliged to identify this basis of decision, however generally, in open reasons, to enable its legitimacy under European Union law to be challenged. There is no reason to assume that the Tribunal, assisted as it would also be by a special advocate, would fail to do this.

(c) Effective legal protection

18. The question is therefore whether the closed material procedure authorised by United Kingdom law provides effective legal protection, by establishing a system of legal remedies and procedures to ensure respect for the relevant rights conferred by the Race Relations Act and the Employment Equality Regulations in implementation of the United Kingdom's obligations under the two Directives. Mr Allen relies upon the decisions of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P *Kadi v Council of the European Union* and the General Court in Case T-85/09 *Kadi v Commission of the European Union (Council of the European Union intervening)*. These two cases concerned the validity of the European Union's own measures, and the two European Courts were charged not merely with ascertaining and interpreting the relevant European legal principles applicable under the Treaties, but also with applying these to the particular measures and circumstances before them.

19. In the former case [2009] AC 1225, the Court of Justice addressed Council Regulation 881/2002 which aimed to mirror within Europe a similar asset-freezing regime to that mandated by Security Council Resolutions for all member states of the United Nations. The Regulation, in its Annex I, simply listed as persons whose assets were to be frozen persons whose names appeared on a list drawn up by the Security Council's Sanctions Committee, and no opportunity was given before or after its passing to such persons to mount any legal challenge to such listing at either the Security Council or the European level. The Court of Justice accepted that:

> "342 ….. with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters."

It went on:

> “343 However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.
>
> 344 In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 131).”

20. The Regulation was annulled in respect of Mr Kadi and Al Barakaat (a Swedish foundation) because there had been no procedure for communicating any evidence or for any hearing of persons listed, so that such persons’ rights of defence and to an effective legal remedy were infringed. But the Court postponed the annulment for up to three months from 3 September 2008.

21. The second *Kadi* case [2011] 1 CMLR 697 was a sequel. After the first case, the Commission sought and obtained from the Sanctions Committee a summary of its reasons for listing Mr Kadi, communicated that to him and received his comments on it on 10 November 2008. On 28 November 2008 the Commission by Commission Regulation (EC) No 1190/2008, made pursuant to a power in Regulation 881/2002 to amend Annex I to that Regulation, recited this course of events and purported on that basis to amend Annex I to reinsert Mr Kadi and Al Barakaat. Mr Kadi again successfully challenged this. The General Court held that his

> “rights of defence had been ‘observed’ only in the most formal and superficial sense, as the Commission in actual fact considered itself strictly bound by the Sanctions Committee’s findings and therefore at no time envisaged calling those findings into question in the light of the applicant’s observations” (para 171).

The General Court went on to say that the Commission, notwithstanding recitals in its Regulation, “failed to take due account of the applicant’s comments” (para 172) and that

> "the procedure followed by the Commission, in response to the applicant's request, did not grant him even the most minimal access to the evidence against him. In actual fact, the applicant was refused such access despite his express request, whilst no balance was struck between his interests, on the one hand, and the need to protect the confidential nature of the information in question, on the other (see, in that regard, the judgment of the Court of Justice in *Kadi,* paras 342 to 344)" (para 173).

The General Court noted that this conclusion was consistent with the reasoning on the European Court of Human Rights in *A v United Kingdom* [2009] 49 EHRR 625 (para 176).

22. Earlier in its judgment, at paras 146-147, the General Court said this about national security issues, with reference to its previous judgment in Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran* v *Council of the European Union* [2006] ECR II-4665 ("*OMPI*"):

> "146 The General Court also noted in that regard, at para 156 of *OMPI,* that, although the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in that court's view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism (see the judgment of the European Court of Human Rights in *Chahal v United Kingdom,* para 131, and case law cited, and its judgment in *Őcalan v Turkey* (2003) 37 EHRR 238, para 106 and case law cited).
>
> 147 The General Court added, at para 158 of *OMPI*, that it was not necessary for it to rule, in the action before it, on the separate question as to whether the applicant and/or its lawyers could be provided with the evidence and information alleged to be confidential, or whether they had to be provided only to the Court, in accordance with a procedure which remained to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection".

23. The question identified by the General Court in para 147 did not arise for decision in either of the two *Kadi* cases. It is, however, clear from both *Kadi* cases that the Court of Justice will look for guidance in the jurisprudence of the European Court of Human Rights when deciding whether effective legal protection

exists, and how any balance should be struck when a question arises whether civil procedures should be varied to reflect concerns relating to national security. A national court, faced with an issue of effective legal protection or, putting the same point in different terms, access to effective procedural justice, can be confident that both European courts, Luxembourg and Strasbourg, will have the same values and will expect and accept similar procedures. Article 6(2) of the Treaty on the European Union ("The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law") and the Charter of Fundamental Rights already point strongly in this direction. Assuming that the European Union will in due course formally subscribe to the European Convention on Human Rights, as contemplated by the Treaty amendments introduced under the Treaty of Lisbon, the expectation will receive still further reinforcement.

24. In the present case, the Home Office applied for and obtained the Tribunal's order for a closed material procedure in order to be able to defend itself against Mr Tariq's claim that the removal of his security clearance involved unlawful discrimination on grounds of race or religion. The case concerns a different subject-matter from that of both *Kadi* cases, where freezing orders were in issue. The effect of freezing orders (made under United Kingdom legislation directly implementing the Security Council's Resolutions) was examined by the Supreme Court in *A v HM Treasury (JUSTICE intervening)* [2010] UKSC 2; [2010] 2 AC 534. Persons subject to such orders became effectively prisoners of the state and there was a devastating effect on them and their families: para 60. *A v United Kingdom*, to which the General Court in *Kadi* referred, also involved a different subject-matter to the present, concerning, as it did, the detention of foreign nationals suspected of terrorist involvement.

25. In *A v United Kingdom* 49 EHRR 695 the European Court of Human Rights said that:

> "216 The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the Al'Qaeda network had given rise to a 'public emergency threatening the life of the nation'. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from article 5(4), a strong public interest in obtaining information about Al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also,

in this connection, *Fox, Campbell and Hartley* (1991) 13 EHRR 157, para 39).

217 Balanced against these important public interests, however, was the applicants' right under article 5(4) to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in sub-paragraphs (a) to (f) of article 5(1), it considers that the case law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a sine qua non (see para 197 above). Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, article 5(4) must import substantially the same fair trial guarantees as article 6(1) in its criminal aspect (*Garcia Alva v Germany* (2003) 37 EHRR 335, para 39, and see also see *Chahal,* cited above, paras 130-131).

218 Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219 The Court considers that SIAC, which was a fully independent court (see para 84 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the state's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220 The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing

the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of article 5(4) would not be satisfied."

26. In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, the House of Lords applied the reasoning in para 220 of *A v United Kingdom* when concluding that a closed material procedure involving a special advocate could be legitimate in the context of the imposition of a control order on a suspected terrorist, so long as the case was not based solely or to a decisive extent on closed material.

27. Mr Allen submits that the fundamental nature of equality rights makes it just as critical that Mr Tariq should receive the fullest procedural rights in this case as it was for Mr Kadi or A or AF to have such rights. However, the reasoning in para 217 of the European Court of Human Rights' judgment in *A v United Kingdom* emphasises the context of that decision, the liberty of the individual. Detention, control orders and freezing orders impinge directly on personal freedom and liberty in a way to which Mr Tariq cannot be said to be exposed. In *R(AHK) v*

Secretary of State for the Home Department (Practice Note) [2009] EWCA Civ 287; [2009] 1 WLR 2049, a claim for judicial review of the refusal of an application for British citizenship, the Court of Appeal distinguished *A v United Kingdom* on the ground that it was focusing on detention. In my opinion, it was justified in making this distinction. An applicant for British citizenship has, of course, an important interest in the appropriate outcome of his or her application. Mr Tariq also has an important interest in not being discriminated against which is entitled to appropriate protection; and this is so although success in establishing discrimination would be measured in damages, rather than by way of restoration of his security clearance (now definitively withdrawn) or of his position as an immigration officer. But the balancing exercise called for in para 217 of the European Court's judgment in *A v United Kingdom* depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself.

28. That the outcome of the balancing exercise may differ with the circumstances is confirmed by three decisions of the European Commission and Court of Human Rights: *Leander v Sweden* (1987) 9 EHRR 433, *Esbester v United Kingdom* (1993) 18 EHRR CD72 and *Kennedy v United Kingdom* (Application No 26839/05) (unreported) 18 May 2010. In *Leander*, the applicant had been refused permanent employment as museum technician with the Naval Museum, which was adjacent to the Karlskrona Naval Base in which the Museum had storage rooms and other objects to which he would need access. The refusal was on account of secret information, contained in an annex compiled by the police, which was alleged to make him a security risk and to which he was refused access. He claimed that there had been breaches of, inter alia, articles 8 and 13 of the Convention. The Court did not accept this.

29. Article 8 provides that everyone has the right to respect for his private life, and that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety" or other specified interests. As to article 8, the Court held that, although there was adverse interference with Mr Leander's private life through the consequences for his access to certain sensitive posts (para 59) and although he was refused any possibility of challenging the correctness of the information concerning him (para 61), the system for collecting and using the secret information contained a number of internal safeguards (para 62) and it could not be concluded that the interference involved in the non-communication of the information to Mr Leander was "not 'necessary in a democratic society in the interests of national security', as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure" (para 66).

30. Article 13 provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". As to article 13, the Court in *Leander* held by a majority (4 to 3) that "an effective remedy under article 13 must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security" (para 84), and that, even if the procedure of complaint to the Government (which Mr Leander had followed and which had led to the Cabinet rejecting his complaint) were not considered sufficient, the aggregate of that and the other remedies of complaint to the Swedish Parliamentary Ombudsman and Chancellor of Justice (which he could also have pursued, although their views would only have been advisory) satisfied the conditions of article 13 (para 84).

31. In *Esbester* 18 EHRR CD72 the Commission was again concerned with a refusal to employ, in this case as an administrative officer with the Central Office of Information ("COI"). The COI having offered to employ Mr Esbester "subject to the satisfactory completion of our inquiries ….", gave as its reasons for refusal simply that "having completed our inquiries …. we are unable to offer you an appointment". Mr Esbester claimed infringement of articles 8 and 13, maintaining that it was likely that the intelligence services had in the course of negative vetting procedures obtained and relied upon information about his private life, which he had had no opportunity to refute. He also alleged that there was inadequate legal regulation regarding the gathering of such information, and that the Security Service Tribunal responsible for investigating complaints gave inadequate protection and was prevented from giving reasons for its decisions. The Commission accepted, following *Leander*, that security vetting based on information about a person's private life constitutes interference within article 8, and it accepted, following *Klass v Federal Republic of Germany* (1978) 2 EHRR 214 and *Malone v United Kingdom* (1985) 7 EHRR 14 that the existence in the United Kingdom of a system for secret surveillance for vetting and the circumstances giving rise to the refusal to employ Mr Esbester gave rise to an inference that such interference had taken place. But it rejected Mr Esbester's complaints as manifestly unfounded.

32. In finding the United Kingdom's system to be "in accordance with the law", the Commission noted that the Court had held in *Leander* that "the requirement of foreseeability in the special context of employment 'vetting' in sectors affecting national security cannot be the same as in many other fields". In finding that the system was "necessary in a democratic society", the Commission said, again with reference to *Leander*, that regard "must also be had in this context to the margin of appreciation of the respondent state which in the area of assessing the requirements of and means of pursuing interests of national security has been held by the Court to be wide". In considering whether there existed adequate and effective guarantees against abuse, as required by the Court's decision in *Klass*, the

Commission noted that the term "national security" was not amenable to exhaustive definition, and that, as regards the lack of reasons for the decisions of the Tribunal, the Court in *Klass*, when considering a similar problem, had "found that the state could legitimately fear that the efficacy of surveillance systems might be jeopardised if information is divulged to the person concerned". The Commission concluded its discussion of article 8 by saying that

> "In the absence of any evidence or indication that the system is not functioning as required by domestic law, the Commission finds that the framework of safeguards achieves a compromise between the requirements of defending democratic society and the rights of the individual which is compatible with the provisions of the Convention. Consequently it concludes that the interference in the present case was necessary in a democratic society in the interests of national security."

As to article 13, the Commission held that the complaint of lack of an effective remedy failed in the absence of any arguable claim for breach of article 8.

33. In *Kennedy v United Kingdom* decided by its Fourth Section on 18 May 2010, the Court was concerned with a claim that there had been breaches of articles 6 (the right to a fair trial in the determination of civil rights and obligations), 8 and 13 in circumstances where the claimant's requests to MI5 and GCHQ under the Data Protection Act 1998 to discover whether information about him was being processed had been refused on the grounds of national security. Complaints about such refusals to the Investigatory Powers Tribunal ("IPT") chaired by Lord Justice Mummery were examined in private. They concluded with the IPT simply notifying Mr Kennedy that no determination had been made in his favour in respect of his complaints. This "meant either that there had been no interception or that any interception which took place was lawful" (para 20). As to article 8, the Court held that the domestic law, practice and safeguards relating to surveillance satisfied the conditions of that article. It referred to, inter alia, *Leander v Sweden* as establishing that the requirement that the consequences of the domestic law must be foreseeable, before any interference could be said to be "in accordance with the law" under article 8(2), "cannot be the same in the context of interception of communications as in many other fields" (paras 151-152).

34. As to article 6, the Court in *Kennedy* found it unnecessary to decide whether this article applies to proceedings concerning a decision to put someone under surveillance, because it concluded that, assuming it does, the IPT's rules of procedure complied with the requirements of article 6(1) (para 179). The parties' respective cases appear from the following paragraphs of the Court's judgment:

"181. The applicant submitted that even where national security was at stake, a domestic court could not infringe the fair hearing principle in a blanket and uncritical manner. He argued that less restrictive measures were available to achieve the aim pursued, including arrangements to protect witnesses' identities, disclosure of documents with redactions approved by the IPT, provision of a summary of particularly sensitive material under the supervision of the IPT and appointment of special advocates to whom disclosure of sensitive material could be made. He referred to a recent report on secret evidence published in June 2009 by the non-governmental organisation, JUSTICE, which called for the strengthening of disclosure procedures and increased transparency in court proceedings.

182. The Government emphasised that even where article 6(1) applied to a field falling within the traditional sphere of public law, this did not in itself determine how the various guarantees of article 6 should be applied to such disputes (citing *Vilho Eskelinen v Finland* (2007) 45 EHRR 993, para 64). The obligation to read the Convention as a whole meant that the scope of the article 6 guarantees in such a case should be in harmony with the Court's approach to judicial control under article 8. The Government argued that the overarching consideration was that an individual could not be notified of interception measures while interception was ongoing or where notification would jeopardise the capabilities or operations of intercepting agencies. They therefore disputed that the less restrictive measures proposed by the applicant were appropriate. They noted that protection of witnesses' identities would not assist in keeping secret whether interception had occurred. Nor would disclosure of redacted documents or summaries of sensitive material. Further, unless they were appointed in every case, the appointment of special advocates would also allow a complainant to draw inferences about whether his communications had been intercepted.

183. The Government argued that the procedure before the IPT offered as fair a procedure as could be achieved in the context of secret surveillance powers. In particular, a complainant did not have to overcome any evidential burden to apply to the IPT and any legal issues could be determined in a public judgment after an inter partes hearing. Further, the IPT had full powers to obtain any material it considered necessary from relevant bodies and could call upon the assistance of the Commissioner. It could appoint an advocate to assist it at closed hearings. Finally, in the event that the complainant was successful, a reasoned decision would be provided."

35. The Court, in holding that there had been no violation of article 6 or 13 in *Kennedy*, substantially aligned itself with the United Kingdom Government's position – particularly in so far as it endorsed in relation to the concept of a fair trial under article 6 the relevance of similar considerations to those taken into account, previously and in *Kennedy* itself, when applying articles 8 and 13. It held:

> "184. The Court reiterates that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent ….. The Court has held none the less that, even in proceedings under article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70; *Jasper v United Kingdom* (2000) 30 EHRR 441, paras 51 to 53; and *A v United Kingdom* (2009) 49 EHRR 625, para 205). A similar approach applies in the context of civil proceedings.
>
> 185. The Court notes that the IPT, in its preliminary ruling of 23 January 2003, considered the applicant's complaints regarding the compliance of the Rules with article 6(1). It found that, with the exception of rule 9(6) which required all oral hearings to be held in private, the Rules challenged by the applicant were proportionate and necessary, with special regard to the need to preserve the Government's 'neither confirm nor deny policy' ……
>
> 186. At the outset, the Court emphasises that the proceedings related to secret surveillance measures and that there was therefore a need to keep secret sensitive and confidential information. In the Court's view, this consideration justifies restrictions in the IPT proceedings. The question is whether the restrictions, taken as a whole, were disproportionate or impaired the very essence of the applicant's right to a fair trial.
>
> 187. In respect of the rules limiting disclosure, the Court recalls that the entitlement to disclosure of relevant evidence is not an absolute

right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings (see, mutatis mutandis, *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 593, para 46). The Court notes that the prohibition on disclosure set out in rule 6(2) admits of exceptions, set out in rules 6(3) and (4). Accordingly, the prohibition is not an absolute one. The Court further observes that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, are likely to be highly sensitive, particularly when viewed in light of the Government's 'neither confirm nor deny' policy. The Court agrees with the Government that, in the circumstances, it was not possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place. It is also relevant that where the IPT finds in the applicant's favour, it can exercise its discretion to disclose such documents and information under rule 6(4) …...

188. As regards limitations on oral and public hearings, the Court recalls, first, that the obligation to hold a hearing is not absolute. There may be proceedings in which an oral hearing is not required and where the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials. The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court (see *Jussila v Finland* (2006) 45 EHRR 900, paras 41 to 42). The Court notes that rule 9(2) provides that oral hearings are within the IPT's discretion and it is clear that there is nothing to prevent the IPT from holding an oral hearing where it considers that such a hearing would assist its examination of the case. …..

189. Concerning the provision of reasons, the Court emphasises that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Ruiz Torija v Spain* (1994) 19 EHRR 553, para 29). In the context of the IPT's proceedings, the Court considers that the "neither confirm nor deny" policy of the Government could be circumvented if an application to the IPT resulted in a complainant being advised whether interception had taken place. In the circumstances, it is sufficient that an applicant be advised that no determination has been in his favour. The Court further notes in this regard that, in the event that a complaint is

> successful, the complainant is entitled to have information regarding the findings of fact in his case …..
>
> 190. In light of the above considerations, the Court considers that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial. In reaching this conclusion, the Court emphasises the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considers that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's article 6 rights."

As regards article 13, the Court held that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications and, in respect of the applicant's general complaint under article 8, it reiterated "its case law to the effect that article 13 does not require the law to provide an effective remedy where the alleged violation arises from primary legislation", citing in this respect also *Leander v United Kingdom* 9 EHRR 433.

36. These three cases - *Leander*, *Esbester* and *Kennedy* – establish that the demands of national security may necessitate and under European Convention law justify a system for handling and determining complaints under which an applicant is, for reasons of national security, unable to know the secret material by reference to which his or her complaint is determined. The critical questions under the Convention are whether the system is necessary and whether it contains sufficient safeguards. But, subject to satisfactory answers on these questions, national security considerations may justify a closed material procedure, closed evidence (even without use of a special advocate) and, furthermore, (as in *Kennedy* itself) a blanket decision leaving the precise basis of determination unclear.

37. There is however a further decision, even more recent than *Kennedy*, on which Mr Allen relies in an opposite sense. That is *Užukauskas v Lithuania* (Application No 16965/04) decided by the Second Section of the Court on 6 July 2010. The applicant had a licence to keep a pistol and hunting rifle. His request for a licence for another kind of firearm was refused and his existing licence was withdrawn, after his listing by the police in an operational records file maintained by the police to hold data for law enforcement bodies obtained during operational

activities. He instituted proceedings challenging his listing, and the court, after examining classified material submitted by the police without disclosure to the applicant, upheld the listing. He complained to the European Court of Human Rights on the basis that there had been a breach of article 6(1). The Court said (para 48):

> "The Court is not insensitive to the goals which the Lithuanian law enforcement authorities pursued through their operational activities. Likewise, the Court shares the Government's view that documents which constitute state secrets may only be disclosed to persons who possess the appropriate authorisation. And yet the Court notes that Lithuanian law and judicial practice provide that such information may not be used as evidence in court against a person unless it has been declassified, and that it may not be the only evidence on which a court bases its decision (see paras 20-22 above)."

It went on to indicate that the file was the only evidence of the applicant's alleged danger to society, that he had repeatedly asked for its disclosure to him, even in part, and that, without it, he had no possibility of being apprised of the evidence against him or of being able to respond to it (paras 50-51). The Court concluded (para 51):

> "In conclusion, therefore, the Court finds that the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of the applicant. It follows that there has been a violation of article 6(1) in the present case."

The case has the special feature that the procedure adopted was contrary to Lithuanian law. Quite probably for this reason, no reference was made to any of the decisions considered in paras 28 to 36 of this judgment. There was evidently also no procedure under Lithuanian law for the use of a special advocate to consider closed material: the choice lay between declassification and no use of the material at all. The decision is therefore very far from the present, and does not offer assistance on the issues which arise on this appeal.

(d) Necessity for a closed material procedure in this case

38. In the present case, Mr Allen submits that no necessity is shown for a closed material procedure. He submits that "the rule of law and the maintenance of the modern democratic state [will] not [be] imperilled if the Home Office loses this

case for want of advancing a secret case". In other words, the worst that may happen is that the Home Office has to pay an unmeritorious claim. On this basis, Mr Allen distinguishes control order cases such as *AF (No 3)*, in which it could be said that national security would be directly imperilled if secret evidence could not be used to justify imposing a control order. This distinction would positively encourage unmeritorious claims; and it would on any view mean that the government could only operate a security vetting system on pain of having to accept or pay all claims for discrimination which appeared sufficiently arguable to avoid being dismissed as abusive.

39. The only other possibility is that a court might, following the Court of Appeal decision in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786, determine that, if the national security material could not be deployed in defence, the claim might not be fairly justiciable at all. Laws LJ said of this situation in *Carnduff* (para 36) that ".... a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all". Under that possibility, it would be Mr Tariq's case which would fail in limine.

40. Neither of these possibilities is one which the law should readily contemplate. In the penal context, an accused is presumed innocent until proved guilty; there is a public interest in the trial of suspects before a court, but it is better that the state should forego prosecution than that there should be any risk of an innocent person being found guilty through inability to respond to the full case against them. These imperatives do not operate in quite the same way in a civil context like the present, where the state may not be directly involved as a party at all. The rule of law must, so far as possible, stand for the objective resolution of civil disputes on their merits by a tribunal or court which has before it material enabling it to do this. In considering how this may be achieved, if a defendant can only defend itself by relying on material the disclosure of which would damage national security, a balance may have to be struck between the interests of claimant and defendant in a civil context.

41. Mr Allen's submission also involves anomalies. The *Leander*, *Esbester* and *Kennedy* cases demonstrate that, had Mr Tariq been claiming that the decision to suspend or remove security clearance was unjustified on its merits, he could not have complained about the use of a closed material procedure. Yet, on Mr Allen's submission, all such a claimant would (presumably) have to do would be to claim damages, rather than any other relief. The Home Office could still only defend the claim by disclosing material contrary to the national interest; but, on Mr Allen's case, no problem arises: the Home Office would not have to damage the national interest by making disclosure; instead, it could simply admit liability or defend fruitlessly and lose for want of being able to deploy the material. I cannot think that that is the law, in Strasbourg or domestically.

(e) The acceptability of a special advocate procedure

42. I do not therefore consider that a closed material procedure is in principle inconsistent with the right to an effective remedy in respect of alleged discrimination or with the Human Rights Convention. But there are further strings to Mr Allen's case, which call for closer examination of the actual procedure, in particular the use of a special advocate. A special advocate procedure has been accepted as potentially useful in both United Kingdom and Strasbourg case law. Thus, in *A v United Kingdom*, addressing the issue of detention of terrorist suspects without trial, the Court of Human Rights said (para 220):

> "The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate."

The Court went on:

> "While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations."

It concluded by saying that where the open material consisted of general assertions and the decision to maintain the detention was based "solely or to a decisive degree" on closed material, the procedural requirements of article 5(4) would not be satisfied. Domestically, the House of Lords in both *Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] AC 440 and *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 accepted a special

advocate procedure, while endorsing in *AF (No 3)* the applicability, in the context of control orders, of the approach taken in *A v United Kingdom*.

43. Mr Allen draws attention to a report of the Joint Committee on Human Rights of the Houses of Lords and Commons on *Counter-Terrorism Policy and Human Rights* (Session 2006-2007) (HL Paper 157, HC 394), published 30 July 2007, which precedes the cases mentioned in the previous paragraph. The Committee was addressing the use of special advocates in, in particular, control order proceedings, but it also heard evidence from four special advocates (including Ms Farbey who acts in this case), which ranged more widely. It identified a number of concerns. These included, first, the overriding duty to which it saw both SIAC and a court as being subject, to ensure that material was not disclosed contrary to the public interest, in other words its inability to balance the interests of justice to the individual against the public interest in non-disclosure (paras 196 and 199). It was also concerned by, secondly, the difficulties presented if closed material was not "gisted" (paras 195 and 199) and, thirdly, the inflexibility of the prohibition on communication between special advocates and the person concerned or his or her legal representatives, once the special advocate had seen the closed material (paras 203 and 205).

44. The first of these concerns is covered and resolved by case law subsequent to the Joint Committee's Report. Under rule 54(2) the employment tribunal or judge has a discretion. This is subject to rule 54(4), according to which a tribunal or judge, when exercising its or his functions, "shall ensure that information is not disclosed contrary to the interests of national security". But the tribunal or judge is subject to the overriding objective to deal with cases justly under regulation 3 of the Employment Procedure Regulations, and, most importantly also, obliged under section 3 of the Human Rights Act 1996 to interpret primary and secondary legislation in a way which is compatible with Convention rights. In *Secretary of State for the Home Department v MB* [2008] AC 440 (decided 31 October 2007), the House of Lords held that paragraph 4(3)(d) of the Prevention of Terrorism Act 2005 (the terms of which parallel those of rule 54(2)) "should be read and given effect 'except where to do so would be incompatible with the right …. to a fair trial' " (para 72, per Lady Hale; and see paras 84 and 92 per Lord Carswell and Lord Brown). The result was that, when and if the court did not consider that material could safely remain closed, the Secretary of State had a choice: either to disclose to the person concerned, or to withdraw reliance on the material. The House followed and applied this reasoning in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, when deciding that persons subject to control orders must be told the gist of the case against them. Applying it in the context of the present secondary legislation in rule 54(2), it means that, even if disclosure of material to the person concerned might involve some potential damage to national security, an employment tribunal or court might, weighing the interests of justice, conclude that either the state should make such disclosure, not

merely to the special advocate but also to the person concerned, or it should withdraw any reliance on the material. Likewise, in relation to the third concern, it is a matter of discretion how far such contact is permitted, and the tribunal or judge can and should exercise such discretion flexibly and after balancing the competing interests. The second concern involves consideration of the case law and issue discussed in paras 28 to 37 above and 63 to 68 below.

45. Mr Allen submits, first, that, despite the general endorsement of its potential appropriateness in these cases, the special advocate procedure involves flaws undermining its acceptability; and, secondly, that, even if the special advocate procedure is otherwise acceptable, this can only be on the basis of disclosure of the substance of the Home Office's case ("gisting") in respect of Mr Tariq. Since the Court of Appeal accepted this second submission, it arises for consideration as a result of the Home Office's cross-appeal.

46. The flaws which Mr Allen identifies relate to the special advocate's role and powers and the lack of guidance as to their exercise or supervision. These are matters of detail which he submits have gone largely and unjustifiably without scrutiny in previous cases. As to role, Mr Allen takes issue at the outset with the appointment of special advocates "by the Attorney General who is the government's principal legal adviser". This is a point which was addressed and is the subject of previous authority in the form of the House of Lords' decision in *R v H* [2004] UKHL 3; [2004] 2 AC 134, where the suitability of the Attorney General to act in this respect had been questioned in the courts below. Lord Bingham giving the unanimous opinion of the House said (para 46):

> "In our opinion such doubt is misplaced. It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice: see *Halsbury's Laws of England,* 4th ed, vol 44(1) (1995), para 1344; *Edwards, The Law Officers of the Crown* (1964), pp ix, 286, 301-302. It is in that capacity alone that he approves the list of counsel judged suitable to act as special advocates or, now, special counsel, as when, at the invitation of a court, he appoints an amicus curiae. Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested. It would perhaps allay any conceivable ground of doubt, however ill-founded, if the Attorney General were to seek external approval of his list of eligible advocates by an appropriate professional body or bodies, but such approval is not in

> current circumstances essential to the acceptability of the procedure."

47. Special advocates are appointed from the independent bar or solicitor-advocates on the basis of open competition, and are selected for inclusion on the panel on the basis of their abilities. Mr Tariq was able to make representations as to the choice of his special advocate, in accordance with para 98 of the Treasury Solicitor's Special Advocates Guide, *Special Advocates – A Guide to the Role of Special Advocates and the Special Advocates Support Office* ("SASO"). His suggested choice was appointed. Para 88 of the Special Advocates' Guide further makes clear that:

> "The role of the Attorney General (or Solicitor General, acting in his place by virtue of section 1 Law Officers Act 1997) in appointing a special advocate is purely formal. No 'instructions' (other than in the purely formal sense) will come from the Law Officers to special advocates indicating any particular way that the case in which the special advocate is instructed is to be argued. That is a matter for special advocates and the appellant, to the extent that the appellant engages with the special advocates."

Mr Allen's first point on role is therefore one I reject.

48. Mr Allen next submits that special advocates are subject to a conflict of interest which would be prohibited in private litigation. This is said to arise from the fact that they are supported by a unit (SASO) which is located within the Treasury Solicitor's Department. It is not disputed (or disputable) that legal and administrative support is necessary for a special advocate procedure to work; and it is unclear as to where else such support might or should be located. The submission is simply that there is an impermissible conflict of interest. Reliance is placed on the Solicitors' Code of Conduct 2007. Rule 3 precludes a solicitor from acting (without informed consent) where there is a conflict of interests - defined as existing where, inter alia, the solicitor or his firm owes separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict. Mr Allen further submits that there is no sufficient "Chinese wall" between SASO and the remainder of the Treasury Solicitor's Office to enable reliance on that possibility, which was discussed in the House of Lords in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222.

49. In my opinion, these objections also fail. As to the former, the Treasury Solicitor does not have two clients and is not in breach of the professional code.

The special advocate is an independent (security-cleared) member of the bar or solicitor-advocate, who is not professionally engaged by or on behalf of Mr Tariq, though he or she is charged to represent Mr Tariq's interests. As the Special Advocates Guide states (para 113):

> "Actual conflicts of interest in the usual sense do not arise, since a special advocate owes no duty to the person whose interests he represents. However, a special advocate should be careful to ensure that no situation arises in which there could be any perception of anything other than absolute independence on his part."

The Guide then reminds special advocates of the need for care to avoid any perceived conflict of interest when undertaking the role as well as in the future.

50. SASO, which supports special advocates, operates for all practical purposes as a separate unit, with an established Chinese wall arrangement dividing it from the rest of the Treasury Solicitor's Office. Maurice Kay LJ set out the position (para 30):

> "SASO was set up in 2006 in response to the recommendation of the Constitutional Affairs Select Committee in its report on the operation of the Special Immigration Appeals Commission and use of SAs [special advocates] (7th report, session 2004-2005, 3 April 2005). The functions of SASO are described in *Special Advocates - A Guide to the Role of Special Advocates and the Special Advocates' Support Office,* which is published on the Treasury Solicitor's Department's website. It is SASO that provides an SA with formal instructions. It also provides legal and administrative support to SAs and acts as the librarian of closed case law for them. Although formal instructions originate with SASO, it has no input into decisions such as whether to appeal a closed adverse judgment or to open part of a closed judgment. Such matters are for the independent judgment of the SA alone. Although SASO is physically located within the premises of the Treasury Solicitor at One Kemble Street, it has an established Chinese wall arrangement and is for all practical purposes a separate entity. It comprises five lawyers and three administrators. Four lawyers and two administrators form the SASO (closed) team, the remaining lawyer and administrator forming the SASO (open) team. The open team does not have security clearance. It alone communicates with the litigant's open representatives. Although other relevant litigation teams within the office of the Treasury Solicitor are able to share their facilities, this is not so in relation to SASO's resources and facilities. It has completely separate

> document-handling, communication, storage and technology facilities. The four lawyers who carry out casework on cases in which the SAs are instructed do not carry out any work for any other part of the Treasury Solicitor's office. The fifth lawyer is at Grade 6 level. He does not have his own casework in relation to cases involving SAs. His role is more supervisory and he has a wider line management role which extends to the general private law litigation team. He may report to the Attorney General but only in relation to open issues in matters where SAs are instructed. In addition, in order to protect the independence of the SASO team, there are conflict checks to ensure that other members of the private law team do not act in cases which are in any way relevant to SASO."

51. Mr Allen challenges the adequacy of this system. The information about its operation based on the Special Advocates Guide was amplified by a Home Office note produced during the Court of Appeal hearing. Mr Tariq invites scepticism about information provided in the context of litigation in which, he suggests, "the Treasury Solicitor has an interest in the status quo". The information that "SASO operates on a Chinese wall basis with the Treasury Solicitor teams who represent the Government in cases in which special advocates appear" is however contained in the Special Advocates Guide (para 87). The arrangements described in both documents evidence a serious intention to achieve such a separation, and there is no reason to doubt their genuineness or efficacy. Significantly, as Maurice Kay LJ indicated in the passage quoted above, the position is that, although formal instructions originate with SASO, SASO has no input into special advocates' decisions, which are taken only by the relevant independent special advocate. One can also be confident that, if any special advocate or court at any point suspected that the separation between SASO and other government legal teams was in any way incomplete, this would at once be brought to light. Maurice Kay LJ, based on his own experience, commented (para 32):

> "If I may be permitted a subjective observation: if such problems were evident they would be expected to provoke adverse judicial comment but, in my experience, the system, although inherently imperfect, enjoys a high degree of confidence among the judges who deal with cases of this kind on a regular basis."

52. In these circumstances, Mr Allen focuses on the fifth of the five SASO lawyers, a grade 6 lawyer who has no case-work responsibility at all, but who does have a line management role in relation to both the SASO team and the Treasury Solicitor's general private law team. He also chairs the monthly special advocates' meetings at which cases and tactics are discussed, the minutes of which are sent to the Attorney General's office, and he may occasionally brief the Attorney General's office on open issues only. After pointing out that a person in Mr Tariq's

position will instruct the special advocate before any closed material procedure begins, Mr Allen suggests that the description given of the grade 6 lawyer's activity means that the content of such instructions could be shared with parts of the Treasury Solicitor's office outside the SASO team or even with the Attorney General. I do not regard this as realistic. Substantive legal decisions are, as stated, taken by the special advocate. The grade 6 lawyer has no case-work responsibility, and would not on the face of it be likely even to know of any instructions given by Mr Tariq. Even if he did know, disclosure to anyone outside the SASO team would involve a serious breach of his duty. There is no reason to think that minutes of the monthly meeting circulated to the Attorney General's office would disclose such instructions, and the special advocate would presumably receive them and ensure that they did not. There is also no reason to think any briefing of the Attorney General's office could or would go into detail about individual cases, still less about instructions given by Mr Tariq. It is clear that the Attorney General has no role and no detailed knowledge in relation to individual cases.

53. In *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 the House was concerned with accountants (KPMG) who were in possession of information confidential to a former client (Prince Jefri) which might be relevant to instructions which they then accepted from the Brunei Investment Agency, of which Prince Jefri had been chairman, to investigate the whereabouts of certain assets suggested to have been used by Prince Jefri for his own benefit. The House granted an injunction restraining KPMG from acting for the Agency. It held that the burden was on KPMG to show that there was no risk of the information coming into the possession of those within KPMG acting for the Agency. KPMG had attempted to erect a Chinese wall, but this was ad hoc and within a single department; further the two teams involved - one which had acted for Prince Jefri and the one which was acting for the Agency - contained large and rotating memberships of persons accustomed to working with each other. In these circumstances, the House held that, although there was no rule of law that "Chinese walls" or other similar arrangements were insufficient, nevertheless, to eliminate the risk, "an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work" (per Lord Millett, at p 239D-E).

54. The present case falls into an opposite category. SASO has a small team which works separately under arrangements which are not ad hoc, but well-established, and it uses the services of independent outside special advocates, who can be relied upon to reinforce the culture and reality of such separation. There is no reason to doubt the genuineness and efficacy of the Chinese wall which has been set up in this way to service special advocates' needs, in particular by providing assistance described in para 90 of the Special Advocates' Guide.

55. Mr Allen makes other further criticisms of the arrangements for special advocates: he submits that special advocates lack supervision, that there is insufficient guidance as to their role and that they lack any or sufficiently defined powers in respect of matters such as disclosure, the calling and cross-examination of witnesses and appeal. I do not regard these criticisms as well-founded or as rendering the whole closed material procedure unfair. Special advocates are experienced independent practitioners, accustomed to act of their own initiative and to take difficult decisions, and able to raise points of doubt or difficulty with the tribunal or court before which they appear. The special advocate's role is familiar in a variety of contexts. It has been extensively described in the Special Advocates' Guide. It divides into two parts, the open and closed. The Guide notes that throughout the open part, where the parties are exchanging open material, the special advocate will have the opportunity to meet the person in whose interests he or she is to act and to obtain as good an understanding as possible of his or her case (paras 99 – 100). Once the open stages have been completed the Secretary of State will serve his or her closed material upon the special advocate only (paras 101 – 102).

The Guide goes on (para 102):

> "The receipt of closed material … marks the end of the period in which the special advocate may communicate directly with the appellant. It should be noted that communication with the appellant is still possible at this point – but any communication from the special advocate to the appellant after this time requires the permission of the Court and the proposed format of it must be notified to the Secretary of State who can make objections if he so wishes (see SIAC Rule 36(4) and CPR 76.25(4))."

56. During the closed phase, the special advocate's role was summarised by Sedley LJ in *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2009] INLR 180 in this way at para 17:

> "The ways in which a special advocate will seek to represent the interests of an appellant are, first, to test by cross-examination, evidence and argument the strength of the case for non-disclosure. Secondly, to the extent that non-disclosure is maintained, the special advocate is to do what he or she can to protect the interests of the appellant, a task which has to be carried out without taking instructions on any aspect of the closed material."

57. In relation to the protection of the interests of the person in Mr Tariq's position in relation to disclosure after the closed phase has begun, the Guide amplifies the special advocate's role (in the largely parallel context of his or her role in proceedings before SIAC) as follows (para 103):

> "It is now for the special advocate to take a view himself on the material and to decide whether any of what is contained within the closed material should in fact be made open (and therefore be disclosed to the appellant) because its disclosure would not harm the public interest - e.g. the material is already in the public domain or could not be regarded as damaging to national security or other public interests. Sometimes, the special advocate will submit that a summary or gist of the material could be safely disclosed to the appellant. The special advocate has a period after service of the closed material in which to consider and prepare written submissions on what, if any, of the 'closed' material should become open. These are known as rule 38 submissions in SIAC and rule 29 submissions in Control Order proceedings (although they are in fact governed by CPR 76.29). These submissions may also include requests to the Secretary of State for further information or documents to be provided to the special advocate. This period has usually in SIAC been a period of two to three weeks (although no period is specified - see SIAC Rules rule 38(3)). In the CPR, similar provisions specify a period of two weeks for the special advocate to indicate whether he challenges the Secretary of state's assessment of what is open and what is closed (see rule 76.29(3)), though the Court may modify it in appropriate circumstances."

58. With regard to the hearing on the merits, the special advocate will be present during the open part, when he or she will have the opportunity to observe how the case is put by counsel both for and against the person whose interests the special advocate will be protecting during the closed phase. The closed hearing will take place, and all but the special advocate and the Secretary of State will withdraw. I see no reason why a special advocate may not, where appropriate, take steps to call factual or expert evidence during the closed phase, if necessary applying for any necessary witness summons. The Guide is in my view correct in contemplating this (para 108):

> "There is also a possibility that the special advocate may call his own witnesses. This latter has never, to date, been undertaken, certainly not in a SIAC context. There appears no reason in principle, however, why this should not be possible, and special advocates in proceedings in the High Court will have the considerable advantage of being able to call on both the remainder of the CPR (insofar as not

> disapplied) and on the inherent jurisdiction of the Court to achieve such an end. In its June 2005 'Response to the Constitutional Affairs Select Committee's Report into the Operation of SIAC and the Use of Special Advocates', the Government acknowledged that it is, in principle, open to special advocates in SIAC appeals to call expert evidence."

59. On any appeal, it is well-established that the special advocate is able both to appear and represent an appellant's interests in any closed phase of the appeal. Mr Allen suggests that the special advocate's role in positively instituting an appeal in relation to events or decisions occurring during the closed phase is insufficiently clear. Again (and consistently with Maurice Kay LJ's description in para 30, cited in para 50 above) I see no reason why the special advocate's role should not embrace this. The special advocate may, with the court's permission, communicate with Mr Tariq, even after the closed phase has begun (para 50 above); the court would no doubt permit a special advocate to inform a person in Mr Tariq's position that there were closed matters which merited consideration on appeal, even though such matters could not in any way be disclosed. In this way, an appeal could be lodged to enable the special advocate to pursue such matters, although the subject matter and basis of the appeal would remain unknown to the person in Mr Tariq's position.

Reference to the Court of Justice

60. Mr Allen submits that the Supreme Court should refer to the Court of Justice points arising in this case on which European Union law is relevant. Article 267 of the Treaty on the European Union provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court…"

61. The principles of European Union law which arise for consideration in this case are clear. There must in particular be effective legal protection in respect of the rights not to be discriminated against which Mr Tariq invokes, and, so far as guidance is necessary, it is to be found for the relevant purposes in the European Convention on Human Rights and the case law of the European Court of Human Rights. The principles which the European Court of Human Rights would apply in the area of national security have been confirmed recently by the decision in *Kennedy*. The questions before the Supreme Court involve the application of such principles to the circumstances of this case, and in particular to the closed material procedure involving a special advocate which the Employment Tribunal has ordered. There is on this basis no question of interpretation of the European Treaties which calls for a reference under article 267 as explained by the Court of Justice in Case 283/81 *Srl CILFIT v Ministry of Health* [1982] ECR 3415. It is not the role of the Court of Justice to rule on the application of established general criteria to a particular provision or arrangement, which must be considered in the light of the particular circumstances of the case in question: compare Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* [2004] 2 CMLR 291, paras 21-23, explaining and distinguishing Joined Cases C-240/98 to 244/98 *Océano Grupo Editorial SA v Murciano Quintero* [2002] 1 CMLR 1226. I add that, if Mr Tariq were to have cause for complaint about the application of the relevant legal principles as established by the European Convention on Human Rights, there will always exist the potential to seek redress in Strasbourg. The European Court of Human Rights is not limited to the examination of questions of interpretation or law arising under the Convention, but will re-examine the fairness of their application as a whole in the light of the circumstances of the particular case.

62. It follows that I would hold that the use of a closed material procedure before the Employment Tribunal was and is lawful in the present case, and dismiss Mr Tariq's appeal accordingly.

The Home Office's appeal

63. It is as well to bear in mind at the outset that the general nature of the Home Office's case has been communicated to Mr Tariq. It is that the Home Office was concerned in August 2006 "that [Mr Tariq] could be vulnerable to an approach to determine if terrorist suspects had been flagged to the authorities or to smuggle prohibited items airside" and that its decision to withdraw security clearance in

December 2006 was "based on [his] close association with individuals suspected of involvement in plans to mount terrorist attacks" and on its view that association with such individuals might make him "vulnerable to attempts to exert undue influence on [him] to abuse his position": para 5 above; Mr Tariq must be able to meet this case on a general basis, in particular, by disclosing and describing his relationship and the nature and extent of his association with those of his relatives suspected and his cousin who was ultimately convicted of terrorist activity; and he has, further, on the basis of, in particular, his questioning in interview also been able to mount a sufficiently arguable case of discrimination to avoid any application to strike out his claim: para 6 above.

64. What is in issue is the declaration made by the Employment Appeal Tribunal and upheld by the Court of Appeal to the effect that article 6 of the European Convention on Human Rights "requires [Mr Tariq] to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively": para 3 above. This is worth repeating, because some language used in the Court of Appeal might suggest that Mr Tariq knew nothing at all of the nature of the case against him, as opposed to particular allegations supporting it. Thus, for example, Maurice Kay LJ said that, although a closed material procedure was in principle justified, it was none the less "the right of a litigant to know the essence of the case against him, if necessary by 'gisting'" ([2010] ICR 1034, para 43). He went on to acknowledge that, in a particular case, "this may put the public authority in the invidious position of having to make difficult decisions about disclosure and whether or how a claim is to be defended", but said that "all that is for the future in this litigation. It is the consequence of the requirements of justice".

65. The Home Office by its appeal challenges this conclusion, pointing out that it raises directly the dilemma addressed by the Court of Appeal in the case of *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786. If the disclosure of material would harm national security, but without disclosure the public authority could not defend and would have to capitulate, the claim itself may not be justiciable. The appeal raises the question whether there is an absolute requirement that a claimant should him- or herself see and know the allegations forming the basis of the state's defence in sufficient detail to give instructions to the defence legal team to enable the allegations to be challenged effectively.

66. One problem about the declaration made by the Employment Appeal Tribunal and upheld by the Court of Appeal is that it is questionable whether or how far it differs in any significant way from the ordinary duty of any party in any litigation to disclose the nature of its factual allegations, where no issue of national security arises at all. A second point is that the declaration made does not correspond with any requirement expressed in section 7 of the Employment

Tribunals Act 1996 or in the language of the statutory instruments made under that Act. But the submission is no doubt that, if the Convention requires "gisting" of the nature declared in every case, even though this could damage national security, then the court should under section 3 of the Human Rights Act 1998 find it possible to read into the Employment Tribunals Act 1996 and the ET Procedure Rules and ET National Security Rules introduced under it, some qualification to enable such gisting to occur.

67. The question is therefore whether there is in the European Convention on Human Rights, as explained by the European Court of Human Rights, any such absolute requirement, where this would involve the disclosure to Mr Tariq of the detail of allegations which would in normal litigation require to be disclosed, but which the interests of national security require to be kept secret. Clearly, it is a very significant inroad into conventional judicial procedure to hold a closed material procedure admissible, if it will lead to a claimant not knowing of such allegations in such detail. As the Home Office acknowledges, it is an inroad which should only ever be contemplated or permitted by a court, if satisfied after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case; and this should be kept under review throughout the proceedings.

68. However, to say that it is not possible under the Convention as interpreted by the Court in Strasbourg is in my view impossible, in the light of the clear line of jurisprudence culminating in the Court's decision in *Kennedy* which I have already discussed in paras 27 to 37 above. It is significant that, when the Court of Appeal reached its decision, it did not have the benefit of *Kennedy*.

69. I would therefore allow the Home Office's appeal, and set aside the declaration made below to the effect that there exists an absolute requirement that Mr Tariq personally or his legal representatives be provided with sufficient detail of the allegations made against him to enable him to give instructions to his legal representatives on them. As I have indicated, both Mr Tariq and his legal representatives already know of the general nature of the Home Office's case. The Employment Tribunal will, with the assistance of the special advocate, keep under review and will be able to determine whether any and what further degree of gisting of the Home Office's case, or of disclosure regarding the detail of allegations made in support of it, is required, having regard to (a) the nature of the relevant allegations and of the national security interest in their non-disclosure and in the light of its best judgment as to (b) the significance of such allegations for the Home Office's defence and (c) the significance for Mr Tariq's claim of the disclosure or non-disclosure of such allegations to him.

ANNEX

Employment Tribunals Act 1996, section 10
(judgment, para 9)

"(5) Employment tribunal procedure regulations may make provision enabling a Minister of the Crown, if he considers it expedient in the interests of national security-

> (a) to direct a tribunal to sit in private for all or part of particular Crown employment proceedings;
> (b) to direct a tribunal to exclude the applicant from all or part of particular Crown employment proceedings;
> (c) to direct a tribunal to exclude the applicant's representatives from all or part of particular Crown employment proceedings;
> (d) to direct a tribunal to take steps to conceal the identity of a particular witness in particular Crown employment proceedings;
> (e) to direct a tribunal to take steps to keep secret all or part of the reasons for its decision in particular Crown employment proceedings.

(6) Employment tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to do in relation to particular proceedings before it anything of a kind which, by virtue of subsection

(5), employment tribunal procedure regulations may enable a Minister of the Crown to direct a tribunal to do in relation to particular Crown employment proceedings.

(7) In relation to cases where a person has been excluded by virtue of subsection (5)(b) or (c) or (6), employment tribunal procedure regulations may make provision-

> (a) for the appointment by the Attorney General …. of a person to represent the interests of the applicant; …."

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861)

Schedule 1 The Employment Tribunals Rules of Procedure

"54(1) A Minister of the Crown (whether or not he is a party to the proceedings) may, if he considers it expedient in the interests of national security, direct a tribunal or Employment Judge by notice to the Secretary to:--

(a) conduct proceedings in private for all or part of particular Crown employment proceedings;
(b) exclude the claimant from all or part of· particular Crown employment proceedings;
(c) exclude the claimant's representative from all or part of particular Crown employment proceedings;
(d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings.

(2) A tribunal or Employment Judge may, if it or he considers it expedient in the interests of national security, by order—

(a) do in relation to particular proceedings before it anything which can be required by direction to be done in relation to particular Crown employment proceedings under paragraph (1);
(b) order any person to whom any document (including any judgment or record of the proceedings) has been provided for the purposes of the proceedings not to disclose any such document or the content thereof:--

(i) to any excluded person;
(ii) in any case in which a direction has been given under [sub-]paragraph (l)(a) or an order has been made under [sub-]paragraph (2)(a) read with sub-paragraph (1)(a), to any person excluded from all or part of the proceedings by virtue of such direction or order; or
(iii) in any case in which a Minister of the Crown has informed the Secretary in accordance with paragraph (3) that he wishes to address the tribunal or Employment Judge with a view to an order being made under sub-paragraph (2)(a) read with sub-paragraph (l)(b) or (c), to any person who may be excluded from all or part of the proceedings by virtue of such an order, if an order is made, at any time before the tribunal or Employment Judge decides whether or not to make such an order;

(c) take steps to keep secret all or part of the reasons for its judgment.

The tribunal or Employment Judge (as the case may be) shall keep under review any order it or he has made under this paragraph.

(3) In any proceedings in which a Minister of the Crown considers that it would be appropriate for a tribunal or Employment Judge to make an order as referred to in paragraph (2), he shall (whether or not he is a party to the proceedings) be entitled to appear before and to address the tribunal or Employment Judge thereon. The Minister shall inform the Secretary by notice that he wishes to address the tribunal or Employment Judge and the Secretary shall copy the notice to the parties.

(4) When exercising its or his functions, a tribunal or Employment Judge shall ensure that information is not disclosed contrary to the interests of national security."

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

Schedule 2 The Employment Tribunals (National Security) Rules of Procedure

"8 *Special advocate*

(1) In any proceedings in which there is an excluded person the tribunal or Employment Judge shall inform the Attorney General … of the proceedings before it with a view to the Attorney General … , if he thinks it fit to do so, appointing a special advocate to represent the interests of the claimant in respect of those parts of the proceedings from which-

(a) any representative of his is excluded;
(b) both he and his representative are excluded; or
(c) he is excluded, where he does not have a representative.

(2) A special advocate shall have a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990 or shall be an advocate or a solicitor admitted in Scotland.

(3) Where the excluded person is the claimant, he shall be permitted to make a statement to the tribunal or Employment Judge before the commencement of the proceedings, or the part of the proceedings, from which he is excluded.

(4) Except in accordance with paragraphs (5) to (7), the special advocate may not communicate directly or indirectly with any person (including an excluded person)—

(a) (except in the case of the tribunal, Employment Judge and the respondent) on any matter contained in the grounds for the response referred to in rule 3(3);

(b) (except in the case of a person who was present) on any matter discussed or referred to during any part of the proceedings in which the tribunal or Employment Judge sat in private in accordance with a direction or an order given or made under rule 54.

(5) The special advocate may apply for orders from the tribunal or Employment Judge authorising him to seek instructions from, or otherwise to communicate with, an excluded person

(a) on any matter contained in the grounds for the response referred to in rule 3(3); or
(b) on any matter discussed or referred to during any part of the proceedings in which the tribunal or Employment Judge sat in private in accordance with a direction or an order given or made under rule 54.

(6) An application under paragraph (5) shall be made in writing to the Employment Tribunal Office and shall include the title of the proceedings and the grounds for the application.

(7) The Secretary shall notify the Minister of an application under paragraph (5) and the Minister shall be entitled to address the tribunal or Employment Judge on the application.

(8) In these rules and those in Schedule I, in any case in which a special advocate has been appointed to represent the interests of the claimant in accordance with paragraph (I), any reference to a party shall (save in those references specified in paragraph (9)) include the special advocate.

….

10 *Reasons in national security proceedings*

(1) This rule applies to written reasons given under rule 30 of Schedule 1 for a judgment or order made by the tribunal or Employment Judge in national security proceedings.

(2) Before the Secretary sends a copy of the written reasons ('the full written reasons') to any party, or enters them in the Register under rule 32 of Schedule I, he shall send a copy of the full written reasons to the Minister.

(3) If the Minister considers it expedient in the interests of national security and he has given a direction or the tribunal or an Employment Judge has made an order under rule 54 in those proceedings, the Minister may-

(a) direct the tribunal or Employment Judge that the full written reasons shall not be disclosed to persons specified in the direction, and to prepare a further document ('the edited reasons') setting out the reasons for the judgment or order, but with the omission of such of the information as is specified in the direction;
(b) direct the tribunal or Employment Judge that the full written reasons shall not be disclosed to persons specified in the direction, but that no further document setting out the tribunal or Employment Judge's reasons should be prepared.

(4) Where the Minister has directed the tribunal or Employment Judge in accordance with sub-paragraph 3(a), the edited reasons shall be signed by the Employment Judge and initialled in each place where an omission has been made.

(5) Where a direction has been made under sub-paragraph (3)(a), the Secretary shall-

(a) send a copy of the edited reasons referred to in subparagraph (3)(a) to any person specified in the direction and to the persons listed in paragraph (7);
(b) enter the edited reasons in the Register, but omit from the Register the full written reasons; and
(c) send a copy of the full written reasons to the persons listed in paragraph (7).

(6) Where a direction has been made under sub-paragraph (3)(b), the Secretary shall send a copy of the full written reasons to the persons listed in paragraph (7), but he shall not enter the full written reasons in the Register.

(7) The persons to whom full written reasons should be sent in accordance with paragraph (5) or (6) are-

(a) the respondent;
(b) the claimant or the claimant's representative if they were not specified in the direction made under paragraph (3);
(c) if applicable, the special advocate;
(d) where the proceedings were referred to the tribunal by a court, to that court; and
(e) where there are proceedings before a superior court (or in Scotland, an appellate court) relating to the decision in question, to that court.”

Regulation 2 - Definitions

"'excluded person' means, in relation to any proceedings, a person who has been excluded from all or part of the proceedings by virtue of:-

> (a) a direction of a Minister of the Crown under rule 54(1)(b) or (c) of
> Schedule 1, or
> (b) an order of the tribunal under rule 54(2)(a) read with 54(1)(b) or (c) of Schedule 1;

'national security proceedings' means proceedings in relation to which a direction is given under rule 54(1) of Schedule 1, or an order is made under rule 54(2) of that Schedule;

'special advocate' means a person appointed in accordance with rule 8 of Schedule 2 …."

LORD HOPE

70. I agree that, for the reasons so fully set out by Lord Mance in his judgment and the further reasons given by Lord Brown and Lord Dyson, the appeal by the Home Office should be allowed and that the cross-appeal by Mr Tariq should be dismissed.

71. At the heart of both the appeal and the cross-appeal are two principles of great importance. They pull in different directions. On the one hand there is the principle of fair and open justice. As O'Connor J declared in *Hamdi v Rumsfeld* 542 US 507 (2004), 533, parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified. In European Convention terms, this is the principle of equality of arms which is part of the wider concept of a fair trial: *Kennedy v United Kingdom* (Application No 26839/05) (unreported) 18 May 2010, para 184. On the other there is the principle that gives weight to the interests of national security. This is one of the legitimate aims referred to in articles 8(2), 10(2) and 11(2) of the Convention. The extent of the discretion that must be accorded to the national authorities in this field was recognised in *Leander v Sweden* (1987) 9 EHHR 433, para 59. National security was described as a strong countervailing public interest in *Kennedy*, para 184. But it must be weighed against the fundamental right to a fair trial.

72. The context will always be crucial to a resolution of questions as to where and how this balance is to be struck. Mr Tariq was employed by the Home Office in a capacity for which security clearance was required in the interests of national security. To be effective security vetting will usually, if not invariably, require to be carried out in secret. Its methods and the sources of information on which it depends cannot be revealed to the person who is being vetted. Those who supply the information must be able to do so in absolute confidence. In some cases, their personal safety may depend on this. The methods, if revealed to public scrutiny, may become unusable. These are the unusual circumstances in which the claim Mr Tariq seeks to make in this case must be determined.

73. Mr Tariq's complaint against the Home Office's decision to suspend his security clearance is that it was based on grounds that amounted to direct or indirect discrimination against him on grounds of his race and religion. There is no doubt that he is entitled to a fair and public hearing in the relevant tribunal of his claim that the rights conferred on him by the Race Relations Act 1976 and the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) have been breached. The principle of equal treatment is part of European Union law, but it is for national law to ensure that the right to a fair hearing is respected according to the principles established under the European Convention.

74. By section 10(6) of the Employment Tribunals Act 1996 it is provided that the employment tribunal procedure regulations may enable a tribunal, if it considers it expedient in the interests of national security, to adopt a closed procedure. Section 10(7) of the 1996 Act provides that the procedure regulations may make provision in that event for the appointment by the Attorney General of a special advocate to represent the interests of the applicant. The provisions that were made in the exercise of that power are to be found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861). Rule 54 of Schedule 1 to the Regulations provides for the use of closed procedure, and rule 8 of Schedule 2 provides for the appointment of special advocates.

75. No-one doubts Mr Tariq's right not to be discriminated against on grounds of his race or his religion. But it was his own choice to seek employment in a post for which, in the interests of national security, security clearance was required. He was a volunteer, not a conscript. This is not a case where he is the victim of action taken against him by the state which deprived him of his fundamental rights. Furthermore, as I have already indicated, security vetting is a highly sensitive area. Its intensity will no doubt vary from case to case, but common to them all is the need to preserve the integrity of sources of information and the methods of obtaining it. That must always be the paramount consideration, whatever the nature of the proceedings in which the issue arises. It ensures that the national interest is protected when people are appointed to posts where security clearance is required. Issues of employment and discrimination law raised by people appointed to those posts may require access to the way this process has been carried out. It was no doubt for that reason that the use of the closed procedure and the appointment of special advocates was expressly authorised by the statute.

76. The question then is whether the difficulties that Mr Tariq faces in making good his discrimination claim are sufficiently counterbalanced by the procedures that the Home Office wishes the employment tribunal to adopt. First, there is the use of the closed procedure for the consideration of the material on which the Home Office wishes to rely in its defence. Is the procedure that the Regulations have prescribed for use in national security cases compatible with European Union law? This is the point raised by Mr Tariq's cross-appeal. Second, if the use of the closed procedure is lawful, how is it to be applied in this case? Is the Home Office obliged to give sufficient detail of the material on which it relies to enable Mr Tariq to give detailed instructions to his special advocate to enable that material to be challenged effectively? This is the point raised by its appeal. The Court of Appeal held that the principle illustrated by *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 must apply. This was despite the fact that this would put the Home Office in the invidious position of having to make decisions as to whether, and if so how, the claim was to be defended: [2010] EWCA Civ 462, [2010] ICR 1034, para 50.

77. I have found the second issue more troublesome than the first. As to the first, which is the issue raised in Mr Tariq's cross-appeal, the question is whether the use of the closed procedure in cases of this type impairs the very essence of his right to a fair trial. The right to a fair trial itself is an absolute right, but rights that are to be implied from article 6 of the European Convention are not: *Brown v Stott* [2003] 1 AC 681, 719. Their purpose is to give effect, in a practical way, to the fundamental right. The right to a fair hearing must ordinarily carry with it the right to have proceedings conducted in open court, with full disclosure by both sides. But, for the reasons already mentioned, the use of an open procedure where details of the security vetting process are in issue cannot be resorted to without risk to the integrity of the system which in the national interest must be preserved. The observations of the Court of Justice in Joined Cases C-402/05P and C-415/05P *Kadi v Council of the European Union* [2009] AC 1225, para 344 indicate that European law is willing to accept a closed material procedure in the interests of national security so long as the individual is accorded a sufficient measure of procedural justice. That this is the position that the Strasbourg court too has adopted is amply demonstrated by its decisions in *Kennedy v United Kingdom*, paras 184-190. Parliament has expressed a clear democratic judgment that the tribunal may in its discretion make use of the closed procedure with the assistance of a special advocate.

78. As for the procedure that the 2004 Regulations provide for, several features indicate that the balance has been struck in the right place. First, there is the fact that, under the procedure provided for by rule 54(2) of Schedule 1 to the Regulations, the decision as to whether closed procedure should be resorted to rests with the tribunal or the employment judge. The fact that the decision is taken by a judicial officer is important. It ensures that it is taken by someone who is both impartial and independent of the executive. Second, there is the fact that, as this is a judicial decision, it will not be taken without hearing argument in open court from both sides. It will be an informed decision, not one taken without proper regard to the interests of the individual. Third, it opens the door to the use of the special advocate. Fourth, it is a decision that can and should be kept under review as the case proceeds: see the last sentence of rule 54(2). Fifth, the special advocate can and should be heard as the process of keeping it under review proceeds.

79. As against all that, account must be taken of the consequences for national security if this procedure were not to be available to the tribunal. Without it, there would be a stark choice: to conduct the entire defence in open proceedings however damaging that might be to the system of security vetting, and in particular to those who contributed to it in this case; or to concede the case and accept the consequences. They would not only be financial. They would lead to the government being seen as an easy target for unjustified claims. That would be a field day for the unscrupulous. They could lead to tensions if those who were in a position to make discrimination claims were thought to be enjoying an unfair

advantage because their claims were not likely to be contested if they were to be pressed to the point of a public hearing. I think that the balance lies firmly in favour of allowing the tribunal, in its discretion, to make use of the closed procedure. I would dismiss the cross-appeal.

80. As for the second issue, there is a very real problem. Procedural justice indicates that Mr Tariq should be given sufficient information to enable him to give detailed instructions to his special advocate so that she can challenge the withheld material on his behalf. But Mr Eadie QC for the Home Office insists that the process of gisting as envisaged in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 cannot be resorted to in this case without risk to those who were involved in the security vetting process. In the *AF (No 3)* case I said that what would be needed would vary from case to case, and that the judge would be in the best position to strike the balance between what was needed to enable the special advocate to challenge the case against the individual and what could properly be kept closed: para 86. But I also said that if the concept of an effective challenge was to be applied, where detail matters it must be met by detail: para 87. That is what Mr Eadie objects to in this case.

81. Here again the context for the argument is what matters. This is an entirely different case from *Secretary of State for the Home Department v AF (No 3)*. There the fundamental rights of the individual were being severely restricted by the actions of the executive. Where issues such as that are at stake, the rule of law requires that the individual be given sufficient material to enable him to answer the case that is made against him by the state. In this case the individual is not faced with criminal proceedings against him or with severe restrictions on personal liberty. This is a civil claim and the question is whether Mr Tariq is entitled to damages. He is entitled to a fair hearing of his claim before an independent and impartial tribunal. But the Home Office says that it cannot defend the claim in open proceedings as, for understandable reasons, it cannot reveal how the security vetting was done in his case. That conclusion is unavoidable, given the nature of the work Mr Tariq was employed to do.

82. How then is the balance to be struck here? Mr Tariq will be at a disadvantage if the closed procedure is adopted. But the disadvantage to the Home Office is greater, as unless the closed procedure is adopted it will have to concede the claim. There is no way that the disadvantage to the Home Office can be minimised. It will simply be unable to defend itself. It will be unable to obtain a judicial ruling on the point at all. That would plainly be a denial of justice. The disadvantage to Mr Tariq, on the other hand, is less clear cut. He is not entirely without information, as the general nature of the Home Office's case has been disclosed to him. He will have the services of the special advocate, with all that that involves – second best by far, no doubt, but at least the special advocate will be there. His claim will be judicially determined by an independent and impartial

tribunal, which can be expected to take full account of the fact that the details of the case for the Home Office have had to be kept closed. If inferences have to be drawn because of the quality or nature of the evidence for the Home Office, they will have to be drawn in Mr Tariq's favour and not against him. And throughout the process the need for the evidence to be kept closed will be kept under review as rule 54 of Schedule 1 to the Regulations requires, with the assistance of the special advocate.

83. There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edged rules in this area of the law. As I said at the beginning, the principles that lie at the heart of the case pull in different directions. It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them. I would hold that, given the nature of the case, the fact that the disadvantage to Mr Tariq that the closed procedure will give rise to can to some extent be minimised and the paramount need to protect the integrity of the security vetting process, the balance is in favour of the Home Office. I would allow the appeal.

LORD BROWN

84. I have read Lord Mance's comprehensive judgment and, like him, would allow the Home Office's appeal and dismiss Mr Tariq's cross-appeal. As to the cross-appeal – the question whether a closed material procedure in the employment tribunal can ever be compatible with the Race Directive and the Equal Treatment Framework Directive – there is almost nothing I wish to add to Lord Mance's judgment. To my mind plainly it can. The submission that it is never necessary for reasons of national security to deploy secret evidence in employment tribunal discrimination proceedings because instead the government can simply pay up I find not merely unpersuasive but wholly preposterous. Is it seriously to be suggested that, however unmeritorious such claims may be, the complainant should simply be paid off? Taxpayers' money aside, consider the appalling consequences for the government's reputation were there to be a succession of findings of unlawful racial or religious discrimination and the insidious effect of all this upon relations between different racial groups.

85. As for the appeal – in effect the question whether a complainant in Mr Tariq's position has to be provided with sufficient details of the allegations being made against him (however sensitive the information on which they are based) to enable him to give instructions to his special advocate in order effectively to challenge them – I conclude no less clearly that this is not required. On this question, however, I wish to add a few further thoughts of my own.

86. It is, as I understand it, Mr Tariq's case on the appeal – apparently supported by Mr John Howell QC for JUSTICE and Liberty – that, assuming (contrary to his primary case) that a closed material procedure is available at all in employment tribunal proceedings, the complainant has exactly the same rights to be "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" as the Grand Chamber in *A v United Kingdom* (2009) 49 EHRR 625 (at para 220) decided had to be given to those deprived of their liberty at Belmarsh Prison pursuant to the Anti-terrorism, Crime and Security Act 2001. For simplicity's sake I shall call this degree of disclosure *A*-type disclosure. As is well known, the nine Members of the House of Lords sitting in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 unanimously held that *A*-type disclosure was similarly required in control order cases under the regime established by the Prevention of Terrorism Act 2005 in place of the detention regime.

87. Substantially relying on *A* and on *AF (No 3)*, Mr Allen QC submits that in any special advocate context to which article 6 applies, there is required an irreducible minimum standard of fairness which in every case demands *A*-type disclosure. Prominent amongst the passages prayed in aid from the *AF (No 3)* judgments are, to my considerable surprise, these from my own judgment:

> ". . . 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" (para 116).

> "Plainly there now *is* a rigid principle. Strasbourg has chosen in para 220 of *A* to stipulate the need in all cases to disclose to the suspect enough about the allegations forming the sole or decisive grounds of suspicion against him to enable him to give effective instructions to the special advocate" (para 119).

88. The argument, notwithstanding its apparent acceptance by the Court of Appeal, is to my mind unsustainable. As all the judgments in *AF (No 3)*, my own not least, made plain, the Grand Chamber's judgment in *A* was to be regarded as indistinguishable simply because of the striking similarities between the two situations then under consideration: Belmarsh detention and the control order regime. To suggest that the identical rigid principle will be imported into every situation where article 6 applies "notwithstanding that sometimes this [*A*-type disclosure] will be impossible and national security will thereby be put at risk" is absurd. It is, indeed, to re-assert here the very argument already rejected in relation to the cross-appeal: the argument that, if giving effect to *A*-type disclosure will compromise national security, then it is always open to government instead to pay

up. True it is that in the control order context, government has on a number of occasions since *AF (No 3)* chosen to abandon the control order rather than make the necessary degree of disclosure. That, however, is a far cry from recognising that governments should face the same dilemma in the context of a monetary claim for discrimination. Although the Court of Appeal did not regard these cases as being in "a different category" (para 50 of Maurice Kay LJ's judgment below), for my part I strongly disagree.

89. Not merely, moreover, is there no support for Mr Allen's argument to be found in our domestic jurisprudence but, as Lord Mance convincingly demonstrates, it is now clearly belied by a series of Strasbourg decisions culminating most recently and most decisively in *Kennedy v United Kingdom* (Application No 26839/05) (unreported) 18 May 2010. *Kennedy* concerned a complaint, largely on article 6 grounds, against the ruling of the Investigatory Powers Tribunal (IPT) made on 23 January 2003 as to the legality of various of their rules. A sufficient description of the highly restrictive nature of these rules is to be found at paras 7 and 25 of my judgment in this Court in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 (at paras 8 and 30 of which I noted that the IPT's own decision on these rules was shortly to be considered by the European Court of Human Rights, as now it has been in *Kennedy*). The Court in *Kennedy* assumed (at para 179 of its judgment) that article 6 applies to proceedings before the IPT and then, at paras 181-190 of its judgment (cited by Lord Mance at paras 34 and 35 above) comprehensively rejected the claim that it had been violated. There could hardly be a clearer example of a procedure being held compliant with article 6 notwithstanding the conspicuous absence of anything approaching *A*-type disclosure.

90. The final comments I wish to make in the appeal are these. Security vetting by its very nature often involves highly sensitive material. As an immigration officer, Mr Tariq required security clearance to a comparatively high level (above that of a counter-terrorist check albeit below that of developed vetting). Immigration officers require long-term, frequent and controlled access to secret information and assets. It is surely, therefore, not altogether surprising that, upon his brother's and his cousin's arrest – and more particularly since his cousin's conviction and life sentence for conspiracy to murder arising out of a terrorist plot to attack transatlantic flights from Heathrow – he has been suspended from duty (albeit continuing to be paid) and his security clearance withdrawn. No one suggests that Mr Tariq himself was involved in the plot. What is suggested, however, is that he could be vulnerable to pressures from someone in his community to abuse his position as an immigration officer.

91. Mr Tariq submitted an internal appeal against the Departmental Security Officer's decision to withdraw his security clearance but this was dismissed by the Permanent Secretary of the Home Office (following his consideration of a full

report from the Director of Human Resource Services). Mr Tariq then made a further appeal to the Security Vetting Appeals Panel (SVAP) (presided over by a retired High Court judge) which held both open and closed hearings, with a special advocate appointed for the closed hearings, and which as recently as January 2011 dismissed the appeal. (No objection is taken to the SVAP's use of a closed procedure and special advocate, apparently on the basis that it was bound to use such a procedure and that in any event its decision on the appeal is solely advisory, the department being free to ignore it.)

92. We know nothing of the underlying facts of this case. Assume, however, in a case like the present that someone in the employee's community (perhaps a relative or associate) has given information in confidence to those responsible for reviewing the employee's security clearance which is detrimental to his case. Perhaps it belies assurances he has given as to the limited nature and extent of his contacts with those suspected of terrorist activity. It surely goes without saying that nothing of this could properly be disclosed to the employee beyond perhaps telling him that the department was not satisfied with the assurances he has given. To give chapter and verse of any inconsistencies between those assurances and the information given to the department would be to betray the information provided and quite likely put its provider at risk. Similar considerations could well apply even in respect of an initial vetting procedure.

93. Is it really sensible, one cannot help wondering, to attempt to force disputes in such cases as these into the comparative straitjacket of employment tribunal proceedings. Even if it is, is it sensible to operate in parallel two sets of proceedings, both with closed procedures and special advocates, one before the SVAP, the other before the Employment Tribunal. Of course I recognise that the issues they are determining are not identical. But there must inevitably be some substantial overlap between them and the effort, time and expense involved in all this hardly bears thinking about.

94. In my judgment in *R (A) v Director of Establishments of Security Service* (at paras 34 and 35) I expressly contemplated that in certain circumstances the IPT's exclusive jurisdiction might with advantage be widened. True, I was not considering a case like the present. I seriously wonder, however, whether it might not be wise to channel all disputes arising in security vetting cases to a single tribunal – if not the IPT itself, then a body sharing some at least of its characteristics. That, however, is a thought for the future – perhaps for consideration in relation to a Green Paper we are told will be published later this year with regard to possible ways of resolving, or at least mitigating, the undoubted problems faced by Government in litigation raising sensitive security issues.

LORD KERR

Introduction

95. On 14 February 2008 the Employment Tribunal dealing with Mr Tariq's case sent to the minister a copy of the reasons it proposed to give for making its order under rule 54 of the First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861). It was required to do so by rule 10 of the Employment Tribunals (National Security) Rules 2004 which are contained in Schedule 2 to the 2004 Regulations. The reasons were amended by the minister (or, more probably, by someone acting on his behalf) and were eventually issued to the claimant and his advisers in their amended form on 15 October 2008.

96. The reasons that the tribunal proposed to give Mr Tariq related to the way in which his case would be dealt with. They purported to explain why he and his representatives would be excluded from those parts of the proceedings at which closed evidence was to be given or closed documents were to be considered; why a special advocate was to be appointed to represent his interests in any part of the proceedings from which he and his representatives were to be excluded; and why the proceedings should be held entirely in private. As a means of explaining these matters to Mr Tariq, the reasons given were, to say the least, not informative. Para 10 encapsulated them. It stated:

> "Having read the relevant documents and having heard submissions, I was satisfied that it was expedient in the interest of national security to make an order under rule 54 as set out in the separate document marked as 'Orders'. I was further satisfied that it would be in the interest of the claimant if a special advocate were to be appointed for the matter to be further reviewed, as I am required to do, at the next case management discussion on 1 May 2008 when not only can the issues as to what documents should be in the 'closed' and 'open' bundles and what should be included in the 'closed' and 'open' witness statements be addressed but also any submissions from the special advocate in that regard at that case management discussion in the anticipation that there would have been such an appointment before then."

97. Beyond saying that the decisions as to the way in which his case was to be heard had been taken for reasons of national security, this paragraph conveyed precisely nothing to the claimant. The paragraphs that had preceded it did little more. Apart from rehearsing the submissions that had been made by either party,

they said virtually nothing. But that did not make them immune from the minister's blue pen. In para 5 of the reasons the tribunal had set out (in 5.1, 5.2 and 5.3) the Home Office submissions that the entire proceedings should be held in private; that Mr Tariq and his representative should be excluded while "closed" evidence or documents were being considered; and that the tribunal should consider both the closed evidence and closed documents and that these would be provided to a special advocate, if one was appointed. In its original form, the statement of reasons continued at para 6:

> "The respondents made this application on the basis that given the circumstances and the relationship of the claimant to other parties involved in what was believed to be unlawful activities and the fact that he might have contact with them that there could be inadvertent disclosure by him of information that was either sensitive or classified."

98. Now it should be noted that on 30 August 2006, the departmental security officer, Jacqueline Sharland, had met Mr Tariq and his union representative and she had then explained that the review of Mr Tariq's security clearance had been prompted by national security concerns and that these related to Mr Tariq's vulnerability. At that meeting Mr Tariq indicated that he understood that the withdrawal of his security clearance had occurred because his brother had been arrested. There was no demur from Ms Sharland to this suggestion. Despite this, in October 2008, more than two years later, the minister (or a civil servant acting on his behalf) felt that para 6 of the tribunal's reasons required amendment. He directed that it should be changed so as to read as follows:

> "The respondents made the applications at paras 5.1 - 5.3 above, on the basis that the material in the closed bundle provided to the tribunal was sensitive on grounds of national security and accordingly should not be disclosed to the claimant or his representative."

99. So, although Mr Tariq had been informed by the departmental security officer that his security clearance had been reviewed because he was considered to be vulnerable, and although he had responded that he believed that that had happened because his brother had been arrested, the Home Office view was that it was necessary *on national security grounds* that he should not be told in October 2008 that others who were believed to be involved in unlawful activities might receive sensitive or classified information that he might inadvertently impart to them. It has never been explained why the view was taken that this information could not be disclosed.

100. Mystifying though this is, the second change to the statement of reasons directed by the minister is even more inexplicable. This required the complete deletion of para 8 of the reasons. This paragraph had done no more than summarise an argument made on the respondent's behalf in the presence of Mr Tariq's representative, an argument of which, therefore, it must be assumed, he was fully aware. It had stated:

> "The respondents further maintained that due to the nature of the contact and the place of contact (the claimant's parents' home at which he partially resided with his family during most week-ends), it was inappropriate for all these matters to be disclosed on a 'public' basis and that there were matters properly to be dealt with on a 'closed' basis and for the hearing generally to be in private."

101. Again no explanation for the decision to withhold this information has been given. It seems likely that its subsequent disclosure and the full revelation of what para 6 contained was brought about by representations made by the special advocate appointed to act on Mr Tariq's behalf. Lord Mance has said that this is an indication of one of the purposes that a special advocate may serve. It may very well amount to such an indication but the fact that the intervention of the special advocate was required to secure the release of material which ought never to have been withheld is, in my opinion, profoundly troubling. Lord Mance has suggested that the course of events about the disclosure of this information "offers … a cautionary message". It does more than that. It illustrates all too clearly the dangers inherent in a closed material procedure where the party which asks for it is also the repository of information on the impact that an open system will avowedly have on national security.

The common law right to know and effectively challenge the opposing case

102. The right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process. In *Kanda v Government of Malaya* [1962] AC 322, 337 Lord Denning said:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* down to the decision of

> their Lordships' Board in *Ceylon University* v *Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side made behind the back of the other."

103. The centrality of this right to the fairness of the trial process has been repeatedly emphasised. Thus, in *In re K (Infants)* [1963] Ch 381 Upjohn LJ at pp 405-406 said:

> "It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

104. And in *Brinkley v Brinkley* [1965] P 75, 78 Scarman J said that "for a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see or hear, and thus to challenge, explain or comment upon, seems to us to strike at the very root of the judicial process". In *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689 at 691 Hobhouse J expressed the principle in similarly forthright terms:

> "The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court."

105. Exceptions to the rule that a party to the proceedings must be informed of every detail of his opponent's case have, of course, been recognised. But it is essential to be aware of the starting point from which one must embark on the inquiry whether the principle of equality of arms (which is such a vital hallmark of our adversarial system of the trial of contentious issues) may be compromised. As

a general – indeed, basic – rule, those who are parties to litigation need to know what it is that their opponent alleges against them. They need to have the chance to counter those allegations. If that vital entitlement is to be denied them, weighty factors must be present to displace it. And it is self evident that he who wishes to have it displaced must show that there are sufficiently substantial reasons that this should happen. Put shortly, he who thus avers must establish that nothing less will do.

106. The case made on behalf of the appellant in this appeal has been stigmatised by the suggestion that it amounts to a claim that the state must accept that it should pay compensation even in those instances where the claimant is known to be wholly undeserving but it is impossible to adduce evidence that would establish this because of national security considerations. The respondent claimed – and the majority have accepted – that the law will not contemplate such a situation. In my view, however, this approach carries the danger of allowing the possible consequences of the implementation of the proper principle to effect a modification of the principle itself. So, because, it is said, the state, faced with the dilemma of having to choose between revealing the information on which it relies to defeat the claim and compromising national security by doing so, would be forced to settle the case, a better solution must be found. That better solution is that the state should be allowed to deploy the information on which the claim can be defeated but be absolved from the need to disclose it to the claimant. This solution, it is clear, is founded not on principle but on pragmatism. Pragmatic considerations, of course, have their part to play in the resolution of difficult legal conundrums but, I suggest, they have no place here.

107. Where, as in this case, the challenged decision is the subject of factual inquiry or dispute and the investigation of the disputed facts centres on an individual's actions or, to bring the matter directly to the circumstances of this case, his supposed vulnerability, that individual is the critical source of information needed to discover the truth; in many cases he may be the only source. If he is denied information as to the nature of the case made either directly against him or, as seems more likely here, against others whose presumed relationship with the claimant renders it unsuitable for him to retain security clearance and if he is thereby forced to speculate on the content of the defendant's case, no truly adversarial proceedings are possible. As Upjohn LJ put it in *In re K,* the proceedings are not judicial.

108. The withholding of information from a claimant which is then deployed to defeat his claim is, in my opinion, a breach of his fundamental common law right to a fair trial. Even if the closed material procedure was compatible with article 6 of the European Convention on Human Rights (and for reasons that I will discuss presently, I do not believe that it is) this has no bearing on the appellant's right at common law to be provided with details of the case against him sufficient to

enable him to present a reasoned challenge to it. This court's endorsement of a principle of non-disclosure whereby a party in civil proceedings may have withheld from him the allegations forming the basis of the opposing case is a landmark decision, marking a departure from the common law's long established commitment to this basic procedural right. In my view, the removal of that right may only be achieved by legislation and only then by unambiguous language that clearly has that effect. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, dealing with Parliament's power to legislate contrary to fundamental human rights, Lord Hoffmann at p 131 said:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

109. Although that statement of principle was made in the context of legislation overriding human rights, it applies with equal force to legislation affecting other constitutional rights such as arise in this case. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, at para 27 Lord Steyn said of Lord Hoffmann's dictum, "this principle may find its primary application in respect of cases under the European Convention on Human Rights. But the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum applies to fundamental rights beyond the four corners of the Convention." In my view it is engaged in the present case. And it therefore seems to me remarkable that a modification of such a fundamental right can be achieved without the unambiguous legislative provision that would be required to alter a right arising under the Convention.

110. To recognise that this right continues to exist at common law does not mean that every time the state wishes to withhold information from a claimant which, although vital to the defence of the claim, cannot be revealed for reasons of

national security, it must submit to settlement of the claim. As the experience in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786 illustrates, it is perfectly proper – and, more importantly, principled – to find in such cases that they cannot be regarded as justiciable because no just trial is possible. Where insistence upon a fully fair hearing for a claimant will deny the defendant (or where it is not a party, the state) the protection of its vital interests that the law should recognise, then a truly fair proceeding is not possible and the trial should be halted in limine. Lord Mance has said that this is not an option that the law should readily contemplate. I agree but it seems to me to be a plainly more palatable course than to permit a proceeding in which one party knows nothing of the case made against him and which, by definition, cannot be subject to properly informed challenge. At least in the *Carnduff* situation both parties are excluded from the judgment seat. In the state of affairs that will result from the decision of the majority in this case, one party has exclusive access to that seat and the system of justice cannot fail to be tainted in consequence.

Article 6

111. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

112. It is well established that the overriding right guaranteed by article 6(1), the right to a fair trial, is absolute – see *Montgomery v HM Advocate* [2003] 1 AC 641, 673, *Brown v Stott* [2003] 1 AC 681, 719 and *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379 at para 73. But "the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute": *Brown v Stott* at 704 per Lord Steyn.

113. One of the implicit constituent rights of article 6 is that there should be equality of arms between the parties to proceedings. Of this constituent right, Lord Bingham said in *Brown v Stott* at 695 that it lay "at the heart of the right to a fair

trial". Equality of arms is the means by which a fair adversarial contest may take place. It requires that there must be an opportunity for all parties to be aware of and to comment on all the "evidence adduced or observations submitted, with a view to influencing the court's decision" – *Vanjak v Croatia* (Application No 29889/04) (unreported) 14 January 2010, at para 52.

114. Although, as a constituent element of article 6, equality of arms is not an absolute right, restrictions may only be placed upon it where it is strictly necessary and proportionate do so. A strong countervailing public interest is required to satisfy this requirement. Moreover, the restriction must be sufficiently counterbalanced by appropriate procedures allowed by the judicial authorities. And the restrictions must not be such as effectively to extinguish the very essence of the right. These propositions derive from a series of decisions of the European Court of Human Rights (ECtHR) which constitute "a clear and constant line of authority" emanating from Strasbourg.

115. One may begin with *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249. At para 72 the court said:

> "72. The Court recalls that article 6(1) embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect. … In this respect, the contracting states enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

116. So the very essence of the right must not be impaired and the restriction on the constituent right must be proportionate. In *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1 at para 61 the court said:

> ".. as the applicants recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be

> necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

117. A precisely similar formula was employed by the court in para 52 of its judgment in *Jasper v United Kingdom* (2000) 30 EHRR 441 and in para 52 of *Pocius v Lithuania* (Application No 35601/04) (unreported) 6 July 2010. Significantly, it was also used by the court at para 184 of its judgment in *Kennedy v United Kingdom* (Application No 26839/05) (unreported) 18 May 2010 where it was confirmed that these principles apply with equal force to civil proceedings. From these statements it is clear that the balancing exercise between, on the one hand, full access to all the elements of the equality of arms principle and, on the other, the withholding of evidence on the grounds of national security, must be conducted on the basis that only such restriction on full access to relevant material as is absolutely required can be countenanced. And even if that hurdle is surmounted, it must be shown that the limitation on the rights of the party who is denied such access is adequately offset by sufficient counterbalancing measures. It seems to me that measures can only be regarded as sufficient if they either wholly eliminate the disadvantage that would otherwise have accrued or if they diminish the difficulties deriving from the non-disclosure of the relevant material to a condition of insignificance. Thus as the interveners, Justice and Liberty, have put it, restrictions on untrammelled access to relevant material can only be justified in a justiciable case where sufficient information about the substantive case which a party has to meet is disclosed so that he may effectively challenge it. Otherwise, the limitation on the right to equality of arms can in no sense be regarded as having been sufficiently counterbalanced.

118. A function of the counterbalancing measures is to ensure that the very essence of the right is not impaired. It is, I believe, important to have a clear understanding of what is meant by the essence of the right. If equality of arms lies at the heart of a fair trial, the essence of the right must surely include the requirement that sufficient information about the case which is to be made against him be given to a party so that he can give meaningful instructions to answer that case. In *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440, a case involving a challenge to a non-derogating control order, Lord Bingham referred to the general acceptance by the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 that there was "a core, irreducible, minimum entitlement" for the appellant, as a life sentence prisoner, to be able effectively to test and challenge any evidence which decisively

bore on the legality of his detention. That irreducible minimum entitlement also applied in the case of a control order: see para 43 of *MB*.

119. The opportunity to know and effectively test the case against him (the core irreducible minimum entitlement) surely captures the essence of the right. And it seems to me that the essence *of the right* cannot change according to the context in which it arises. Whether a hearing should be conducted in private or in open session; whether information about the case against an individual should be provided by way of full disclosure or by redacted statements or in the form of a summary or gist; whether witnesses should be anonymised – all of these are variables to which recourse may be had in order to reflect the context in which the requirements of article 6 must be examined. But if the essence of the right is to be regarded (as I believe it must be) as the indispensable and necessary attributes of the right as opposed to those which it may or may not have, its essence cannot alter according to the circumstances in which it falls to be considered.

120. Para 217 of the European Court of Human Rights' judgment in *A v United Kingdom* (2009) 49 EHRR 625 has been cited by Lord Mance as an example of the emphasis given by the court to the context in which the requirements of the right were being considered. That case involved a challenge to the decision of the Home Secretary to certify that each of the applicants should be detained because he reasonably believed that their presence in the United Kingdom posed a threat to national security. As it seems to me the only relevant part of para 217 is contained in the following passage:

> "In view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights, article 5(4) must import substantially the same fair trial guarantees as article 6(1) in its criminal aspect"

121. This says nothing about the essence of the right to equality of arms. It merely (but unsurprisingly) confirms that if one's liberty is to be deprived on foot of the order of the Secretary of State, the same guarantees as are available to defendants in a criminal trial should be extended to those who were the subject of detention orders.

122. Lord Mance also expressed agreement with the decision of the Court of Appeal in *R(AHK) v Secretary of State for the Home Department (Practice Note)* [2009] EWCA Civ 287; [2009] 1 WLR 2049 where, according to Lord Mance's analysis, it was held that a claim for judicial review of the refusal of an application for British citizenship could be distinguished from the requirements prescribed by *A v United Kingdom* on the ground that the latter case's focus was on detention. I

do not agree that the *AHK* case distinguished *A v United Kingdom* or, at least, that it suggested (contra the decision in *A v UK*), that abrogation of the right of a claimant to know the essential elements of the case to be made against him was permissible. The *AHK* case was principally concerned with the question whether a special advocate should be appointed. In the list of principles to be applied in cases where the Secretary of State has decided that the reasons for refusing British citizenship could not be fully disclosed Sir Anthony Clarke MR at para 37 (iv) (d) said:

> "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."

123. Underlying this statement is the acknowledgment that the claimant must be assisted *in meeting the Secretary of State's case.* There is no reason to suppose that the Court of Appeal would have endorsed a procedure where the claimant was effectively prevented from knowing and meeting the essential case made against him. At a theoretical level it is possible that advocates retained to consider material that cannot be disclosed to a claimant can supply the vital ingredient of ensuring that the case made against the claimant is effectively met. In such circumstances the essence of the article 6 right is not lost. But *AHK* is not authority for the proposition that where that indispensable requirement cannot be fulfilled and the claimant is prevented from presenting a fully informed opposition to the case made against him, no violation of article 6 arises because the consequences for the claimant are less serious than the deprivation of his liberty.

124. It is, I believe, crucial to a proper understanding of ECtHR jurisprudence in this area that the essence of the right *under article 6* is that a party is entitled to know and effectively challenge the case made against him. Equality of arms, or a properly set adversarial contest, requires that both parties have equal, or at least a sufficient, access to the material that will be deployed against them. The adversarial contest sets the context and the adversarial contest arises in relation to article 6 rights as opposed to other Convention rights. Thus cases such as *Leander v Sweden* (1987) 9 EHRR 433 (which was concerned with alleged violations of articles 8, 10 and 13) and *Esbester v United Kingdom* (1998) 18 EHRR CD72 (which dealt with claims under article 8 and 13) are of little assistance in determining the requirements of the equality of arms principle under article 6. Equality of arms did not arise in these cases. No adversarial contest was engaged. Whether it is legitimate to withhold information in an article 8 or an article 10 context has nothing to do with the propriety of its non-disclosure where parties are

seeking a resolution of competing cases from a properly informed and impartial tribunal. Articles 8 and 10 are qualified rights. Interference with those rights may be justified on grounds specified in the articles. By contrast, article 6 is not subject to exemption from the effect of interference.

125. *Kennedy v United Kingdom* involved complaints made by the applicant to the Investigatory Powers Tribunal (IPT) that his communications were being intercepted. The applicant had sought specific directions regarding the conduct of the proceedings in order to ensure the protection of his Convention rights under article 6 (1). In particular, he asked that his arguments and evidence be presented at an oral hearing; that all hearings be conducted in public; that there be mutual disclosure and inspection between the parties of all witness statements and evidence upon which parties sought to rely and exchange of skeleton arguments in relation to planned legal submissions; that evidence of each party be heard in the presence of the other party or their legal representatives, with oral evidence being open to cross-examination by the other party; that any opinion received from a commissioner be disclosed to the parties; and that, following its final determination, the IPT state its findings and give reasons for its conclusions on each relevant issue. IPT had held that the applicant's proceedings before that tribunal engaged article 6. That finding was somewhat diffidently contested before ECtHR, the government contending that there was no 'civil right' involved. It was not contended, as it might well have been, that article 6, according to the court's constant jurisprudence, did not apply to cases of surveillance. ECtHR proceeded on the assumption that article 6 did apply.

126. It is significant that the court's judgment is largely preoccupied with a consideration of the various specific claims made by the applicant about how the proceedings should be conducted. The question of providing him with sufficient information in the form of a gist or summary to meet the case against him did not feature in the list of those claims. The question of supplying redacted documents is discussed, however, and the court's decision seems largely to have been influenced by the argument advanced on behalf of the government that it was simply not possible to produce the information that the applicant sought because national security would inevitably be compromised. That stance is entirely consistent with the view that surveillance cases do not engage article 6. It is surprising that more was not made of this by the government and that the court did not address the issue directly. If it had done and if it had followed its own constant jurisprudence, the anomaly, which I believe the decision in *Kennedy* represents, would have been avoided.

127. In *Klass v Federal Republic of Germany* (1978) 2 EHRR 214 at para 75 ECtHR said this about secret surveillance:

> “As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of article 6; as a consequence, it of necessity escapes the requirements of that article.”

128. The logic of this position is inescapable. The entire point of surveillance is that the person who is subject to it should not be aware of that fact. It is therefore impossible to apply article 6 to any challenge to the decision to place someone under surveillance, at least until notice of termination of the surveillance has been given. This approach has been consistently applied by the court. So for instance in *Rotaru v Romania* (2000) 8 BHRC 449 at para 69 the court said “where secret surveillance is concerned, objective supervisory machinery may be sufficient as long as the measures remain secret. It is only once the measures have been divulged that legal remedies must become available to the individual.” It is precisely because *the fact* of surveillance must remain secret in order to be efficacious that article 6 cannot be engaged. It appears to me, therefore, that the decision in *Kennedy* ought to have been made on the basis that article 6 was not engaged because the issues that the case raised were simply not justiciable.

129. That the decision is out of line with the established jurisprudence of the court is perhaps best exemplified by contrasting it with the approach of the Grand Chamber in *A v United Kingdom* as applied by the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. At para 59 Lord Phillips said this about the ratio in *A v United Kingdom:*

> “… I am satisfied that the essence of the Grand Chamber's decision lies in para 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.”

130. Whilst Lord Phillips at para 65 implied that the Grand Chamber’s decision (that non-disclosure cannot deny a party knowledge of the essence of the case against him) might apply only where the consequences for an individual were as

severe as those normally imposed under a control order, there are indications in his and other speeches that the principle is of general application. In particular, Lord Phillips rejected the suggestion that there should be a different standard where the control order did not amount to detention – para 63 and at para 64 he said this:

> "The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence. That is why the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals."

131. The views of Lord Hope were equally clear and comprehensive. At para 83 he said:

> "The approach which the Grand Chamber has adopted is not, as it seems to me, at all surprising. The principle that the accused has a right to know what is being alleged against him has a long pedigree. As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 155, a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him."

132. Lady Hale in para 103 said that Strasbourg had now "made it entirely clear what the test of a fair hearing is". The test was whether the controlled person had had the possibility to challenge effectively the allegations made against him. He had to have sufficient information about those allegations to be able to give effective instructions to his special advocate. If the majority in this appeal are

right, however, the test of a fair hearing in Mr Tariq's case is different. He need not be given sufficient information about the allegations against him to challenge them effectively or to give effective instructions to his special advocate. For my part I cannot understand why this should be so.

133. The result of the decision of the majority is to create a different class of case from that where what Lord Brown has helpfully described as "*A*-type disclosure" must be given. The eligibility criteria for inclusion in this privileged group are not clear. Certainly, the class is not confined to those whose liberty is at stake, as the speeches in *AF (No 3)* make clear. And, presumably, it must also include freezing order cases - *Kadi v Council of the European Union* Joined Cases C-402/05 P and C-415/05 P [2009] AC 1225, as applied by the European General Court in *Kadi II* Case T-85/09 [2011] 1 CMLR 697. If *A*-type disclosure is required in challenges to freezing orders, does it extend to property rights more generally? If it does, why should property rights be distinguished from loss of employment cases? After all, loss of livelihood may be just as devastating as having one's assets frozen.

134. It seems to me that there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made. A fair trial in any context demands that certain indispensable features are present to enable a true adversarial contest to take place. That conclusion is reflected in the later decision of ECtHR of *Užukauskas v Lithuania* (Application No 16965/04) (unreported) 6 July 2010. Lord Mance has sought to distinguish this case on the basis that the procedure adopted was contrary to national law. But that consideration was in no sense central to the court's reasoning. On the contrary, the observation (at para 48) that "Lithuanian law and judicial practice provide that such information may not be used as evidence in court against a person unless it has been declassified, and that it may not be the only evidence on which a court bases its decision" was made in order to draw a contrast with the view that documents which constitute state secrets may only be disclosed to persons who possess the appropriate authorisation. It is quite clear that the violation of article 6 which the court held to have occurred was based on conventional ECtHR principles. This much is evident from para 51 where the court said;

> "In conclusion, therefore, the Court finds that the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of the applicant. It follows that there has been a violation of article 6(1) in the present case."

135. The unavoidable result from this case is that Strasbourg has again made it entirely clear what the test for a fair hearing is where someone seeks to challenge a decision that he should be removed from a firearms register. He is entitled to know the reasons that this has happened in order to be able to effectively challenge them. If that is so, why should someone who has been dismissed from his employment be in a less advantageous position?

Conclusions

136. I have concluded that the Court of Appeal was correct in finding that where article 6 is engaged, it is necessary for a party to proceedings to be provided with sufficient information about the allegations against him to allow him to give effective instructions to his legal representatives and, if one has been appointed, the special advocate so that those allegations can be effectively challenged. I would therefore dismiss the appeal by the Home Office.

137. For the reasons given by Lord Mance, with which I agree, I would hold that the closed material procedure provided for in the Employment Tribunal legislative scheme is not in principle incompatible with article 6 and EU law. I would therefore also dismiss the cross appeal.

LORD DYSON

138. I agree that for the reasons given by Lord Mance the Court of Appeal was correct to hold that the closed material procedure provided for in the Employment Tribunal legislative scheme, including its provision for the appointment of special advocates is in principle compatible with article 6 of the European Convention on Human Rights ("ECHR") and EU law. I also agree that the Court of Appeal was wrong to find that, in all cases in which article 6 (civil) is engaged, it is necessary for an individual to be provided with sufficient information about the allegations against him ("the gist") to enable him to give effective instructions to his legal representatives and the special advocate (where one has been appointed) in relation to those allegations. It is on this second question that I wish to add some words of my own.

General observations about closed procedures

139. The article 6 right to a fair trial is absolute: see, for example, per Lord Hope in *Dyer v Watson* [2002] UKPC D1 [2004] 1 AC 379 at para 73. In principle, a fair trial presupposes adversarial proceedings and equality of arms. Thus, for example,

in *Vanjak v Croatia* (Application No 29889/04) (unreported) 14 January 2010, at para 52, the European Court of Human Rights said:

> "..... independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with. That right means in principle the opportunity for the parties to court proceedings falling within the scope of article 6 to have knowledge of and comment on all evidence adduced or observations submitted, with a view to influencing the court's decision."

140. But the constituent elements of a fair process are not absolute or fixed: see *Brown v Stott* [2003] 1 AC 681 at 693D-E per Lord Bingham; 719G-H per Lord Hope; and 727H per Lord Clyde. This was re-affirmed by the ECtHR in relation to article 5(4) in *A v United Kingdom* (2009) 49 EHRR 625 at para 203: "The requirement of procedural fairness under article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances".

141. Moreover, it has been recognised by the ECtHR that there are circumstances where a limitation on what would otherwise be a general rule of fairness is permissible. Thus in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, at para 61, the European Court of Human Rights said:

> "…the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights may be sufficiently counterbalanced by the procedures followed by the judicial authorities."

142. Prima facie, a closed material procedure denies the party who is refused access to the closed material the right to full and informed participation in adversarial proceedings and to that extent is inconsistent with the principle of

equality of arms. There are two factors which the Secretary of State says are sufficient to counterbalance the effects of the closed material procedure in the present case. The first is that there is scrutiny by an independent court (the Employment Tribunal) fully appraised of all relevant material and experienced in dealing with discrimination cases. The second is the testing by a special advocate of the Home Office's case in closed session.

143. But are these factors sufficient in circumstances where the gist of the Home Office case is not disclosed to the claimant? How can the special advocate represent the claimant's interests if the claimant is unable to give full instructions to him? The answer to these questions in the context of proceedings involving the liberty of the subject is clear. If the special advocate is unable to perform his function in any useful way unless the detainee is provided with sufficient information about the allegations to enable him to give effective instructions to the special advocate, then there must be disclosure to the detainee of the gist of that information: see *A v United Kingdom* at para 220 and, in the context of control orders, *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269. In such a case, there must be disclosure, regardless of how important the competing national interest may be in favour of withholding the information. The consequence of this will inevitably be that in some cases the prosecuting or detaining authorities will be faced with the invidious choice of disclosing sensitive information or risking losing the case.

144. But what is the position in cases which do not involve the liberty of the subject? For the reasons given by Lord Mance and Lord Brown, I agree that neither *A v United Kingdom* nor *AF (No3)* decides this question. Mr Allen QC and Mr Howell QC submit that the reasoning in *A v United Kingdom* is not limited to cases involving the liberty of the subject and should be applied to civil claims too. They submit that, properly understood, the Strasbourg jurisprudence does not support the proposition that a different approach may be adopted to the problem in civil claims. They also say that to distinguish between the requirements of article 6 on the basis of a classification of the type of case involved is unprincipled and will give rise to uncertainty and confusion.

145. But it is clear from para 203 of *A v United Kingdom* itself that article 6 does not require a uniform approach to be adopted in all classes of case. In *Kennedy v United Kingdom* (Application No 26839) (unreported) 18 May 2010, the European Court of Human Rights said that the entitlement to disclosure of relevant evidence is not an "absolute right" (para 187); the character of the proceedings may justify dispensing with an oral hearing (para 188); and the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (para 189). I therefore agree with what Sir Anthony Clarke MR said when giving the judgment of the

court in *R(AHK) v Secretary of State for the Home Department (Practice Note)* [2009] EWCA Civ 287, [2009] 1 WLR 2049 at para 45:

> "The above analysis shows that the European Court of Human Rights considers each class of case separately. The issues in this class of case are a far cry from the issues that arise in the criminal cases discussed by the court in *A v United Kingdom* 19 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 court 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. "

146. Nevertheless, I would accept that the *general* rule is that an applicant should enjoy the full panoply of article 6 rights, including full disclosure of all relevant material and that any limitation on the ordinary incidents of article 6 requires careful justification.

147. In deciding how to strike the balance between the rights of the individual and other competing interests, the court must consider whether scrutiny by an independent court and the use of special advocates are sufficient to counterbalance the limitations on the individual's article 6 rights. In many cases, an individual's case can be effectively prosecuted without his knowing the sensitive information which public interest considerations make it impossible to disclose to him. For example, in a discrimination claim such as that of Mr Tariq, the central issue may well not be whether the underlying security concerns are well founded, but rather whether the decision-making process was infected by discrimination. As Mr Eadie QC points out, Mr Tariq's appeal is not against the assessments or conclusions of the Home Office as to the withdrawal of his security clearance. SVAP provides the expert forum for considering such issues. It was not for the Employment Tribunal to determine whether, for example, it believed or did not believe Mr Tariq's assertions about the nature of his relationships with persons involved in or associated with terrorist activities. Thus in the conduct of a discrimination claim, the special advocate and indeed the judge can to a considerable extent test the case of the alleged discriminator without the input of the claimant.

The surveillance/security vetting cases

148. Lord Mance has referred at para 68 to what he describes as "the clear line of jurisprudence" culminating in the Court's decision in *Kennedy* which demonstrates that, in civil cases, it is not necessary to provide the gist of information which the interests of national security require to be kept secret. I think that it is necessary to examine the authorities with some care to see precisely what these cases do establish. In the absence of special circumstances, our courts should follow any "clear and constant jurisprudence of the European Court of Human Rights": see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at para 26.

149. The first case to note is *Klass v Federal Republic of Germany* (1978) 2 EHRR 214. This involved a challenge to legislation which permitted the authorities to open and inspect mail and listen to telephone conversations in order to protect, inter alia, against imminent dangers threatening the existence or the security of the state. The challenge was based on an alleged breach of articles 6, 8 and 13 of the European Convention on Human Rights. At para 75, the European Court of Human Rights said : "As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of article 6; as a consequence, it of necessity escapes the requirements of that article".

150. The cases of *Leander v Sweden* (1987) 9 EHRR 433 and *Esbester v United Kingdom* (1993) 18 EHRR CD72 are discussed by Lord Mance at paras 28 to 32 above. They can be considered together, although at first sight it may seem odd to refer to them at all since they are not article 6 cases. The claim in *Leander* was brought under articles 8, 10 and 13 and in *Esbester* under articles 8 and 13. I accept that what may be a proportionate and justified interference with a person's rights under article 8 may not correspond *precisely* with what may be a strictly necessary and sufficiently counterbalanced invasion of his right to a fair trial under article 6. Moreover, it is right to point out that *Leander* and *Esbester* were referred to by the European Court of Human Rights in *Kennedy,* but only in its discussion of the claims under articles 8 and 13: see paras 122, 152, 195 and 197. The section in *Kennedy* which deals with article 6 does not refer to either of these authorities. Mr Eadie accepts that *Leander* and *Esbester* did not concern article 6. He relies on them as being directly analogous to the present case, relating to security vetting in an employment context. Issues of fairness were central to the issues arising under articles 8 and 10 and the right to an effective remedy under article 13. The European Court of Human Rights found that the vetting systems in those cases were compatible with article 8 and upheld the right of the state not to disclose the reasons for the rejection of the applicant's application for employment as a result of a security vetting process.

151. Whereas *Klass* is a case where it seems to have been held that article 6 did not apply at all and *Leander* and *Esbester* are not article 6 cases, there can be no

doubt that *Kennedy* is an article 6 case. In *Kennedy* (which was decided after the decision of the Court of Appeal in the present case), the applicant complained about an alleged interception of his communications, claiming that it was a violation of his article 8 rights. He also complained that the hearing before the Investigatory Powers Tribunal ("IPT") was not attended by adequate safeguards as required under article 6 and that, as a result, he had been denied an effective remedy under article 13. Lord Mance has set out the relevant passages of the judgment at paras 34 and 35 above. The submissions of the parties summarised at paras 180 to 183 of the judgment were directed to the question of what article 6 required. It is of note that the Government submitted that the scope of the article 6 guarantees in that case "should be in harmony with the Court's approach to judicial control under article 8".

152. The court's assessment at paras 184 to 191 was explicitly on the basis of the application of article 6. In contrast with para 75 of *Klass,* the court did not say that the case "escapes the requirements of [article 6]". Thus at para 186, the court emphasised that the proceedings related to secret surveillance measures and that there was therefore a need to keep secret sensitive and confidential information. The court continued: "this consideration justifies restrictions in the IPT proceedings. The question is whether the restrictions, taken as a whole, were disproportionate or impaired the very essence of the applicant's right to a fair trial." This is the classic approach to article 6. The court's conclusion at para 190 was that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial. In reaching this conclusion, the court took into account the breadth of access to the IPT (an independent court) enjoyed by those complaining about interception and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. It concluded:

> "In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considers that the restrictions on the applicant's rights in the context of the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's article 6 rights."

153. Mr Allen and Mr Howell submit that *Kennedy* should be understood as a decision that, so long as the very subject-matter of the dispute must justifiably remain secret, is effectively non-justiciable and the substantive protections that article 6 contains cannot be applied in substance to its resolution. In other words, they submit that the decision in *Kennedy* should be analysed as an application of para 75 of *Klass.* If, however, the court had intended to adopt this approach, it would have said so. Instead, it clearly purported to apply article 6.

154. *Kennedy* is a striking decision. But for the security issues raised in the case, it is surely inconceivable that the court would have concluded that the restrictions on the applicant's rights before the IPT (a completely closed procedure without even the protection of a special advocate) were necessary and proportionate and did not impair the very essence of the applicant's article 6 rights. The crucial reason for this conclusion was that the restrictions on the applicant's rights were necessary "in order to ensure the efficacy of the secret surveillance regime". *Kennedy* was a case about a secret surveillance regime by interception of his communications. This same language was used by the court in *Klass* at para 58 to justify the interference with the applicant's article 8 rights in that case (another interception of communications case): "the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision, since it is this very fact which ensures the efficacy of the 'interference'". The same reasoning appears in the security vetting cases of *Leander* and *Esbester.* Thus, for example, at para 66 of *Leander,* the court said that the very fact that the information released to the military authorities was not communicated to Mr Leander "cannot by itself warrant the conclusion that the interference was not 'necessary in a democratic society in the interests of national security', as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure". In support of this proposition, the court referred to para 58 of *Klass.* There is similar reasoning in the Commission's decision in *Esbester.*

155. In my view, the significance of *Kennedy* is that it is a decision explicitly based on an application of article 6 which adopted the same approach as that which was taken by the court in applying articles 8 and 13 in *Leander* and by the Commission in *Esbester.* This provides clear support for the submission of Mr Eadie that, for the purposes of the issues that arise in the present case, there is no material difference between articles 8 and 13 on the one hand and article 6 on the other. I do not consider that, if the complaints in *Leander* and *Esbester* had been based on article 6, the outcome in these cases would have been different.

156. The other point to emphasise is that these cases show that there is no material difference between surveillance cases (such as *Klass* and *Kennedy*) and security vetting cases (such as *Leander* and *Esbester*). In the former, restrictions on an individual's right to disclosure and participation in a hearing will be considered necessary and proportionate if they are required "in order to ensure the efficacy of the secret surveillance regime". In the latter, the restrictions will be considered necessary and proportionate if they are required in order to ensure "the efficacy of the personnel control procedure".

157. Mr Allen and Mr Howell submit that the limited significance of *Leander, Esbester* and *Kennedy* is demonstrated by the decision of the ECtHR in *Užukauskas v Lithuania* (Application No 16965/04) (unreported) 6 July 2010.

Lord Mance has set out the facts at para 37 above. I find this a difficult decision to interpret. On the one hand, the court approached the matter in conventional article 6 terms: see para 46 where it noted that (i) the entitlement to disclosure of relevant evidence is not an absolute right; (ii) it may be necessary to withhold certain evidence to safeguard an important public interest; but (iii) only such measures restricting the rights of the defence which are strictly necessary are permissible and there must be sufficient counterbalancing. At para 48 the court referred to the fact that, according to Lithuanian law and judicial practice, secret information may not be used as evidence in court unless it has been declassified and it may not be the only evidence on which a court bases its decision. It is not clear to me to what extent the court based its conclusion that there had been a breach of article 6 on the fact that use of the secret material against the applicant (which was of "decisive importance" to his case) was contrary to Lithuanian law. But I accept that on the face of it, this is an article 6 decision which does not sit easily with the surveillance/vetting procedure cases to which I have referred. There is no reference to them. There is no weighing of the national interest in the protection of the community against crime against the general right to adversarial proceedings. For these reasons and because it is unclear to what extent the position under Lithuanian law influenced the decision, I agree with Lord Mance that this decision does not cast doubt on the approach adopted in the surveillance/security vetting cases. Unlike Lord Mance, however, I doubt whether the fact that there is no procedure under Lithuanian law for the use of a special advocate to consider closed material is of significance, since, as was pointed out by the European Court of Human Rights in *Kennedy* at para 187, the procedure before the IPT did not permit the use of special advocates either.

158. In my judgment, these decisions show that there is a clear line of authority to support the proposition that, *in surveillance and security vetting cases*, an individual is not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime itself. On the material shown to us, the line of authority may not be very long, but in my view it is sufficiently clear that it should be followed by our courts. The cases show, in particular, that there is no right to be given the gist of relevant information if and to the extent that this would jeopardise the efficacy of the surveillance or security vetting regime.

The present case

159. I have no doubt that article 6 does not require that Mr Tariq should be given the gist of information which would damage or jeopardise national security. First, and above all, this is a security vetting case and in such a case article 6 does not require gisting if and in so far as it would jeopardise the efficacy of the personnel control procedure. That is a sufficient reason for allowing the Home Office appeal. There is no sensible basis for distinguishing the present case from *Leander* and

Esbester. In those cases (which concerned a complaint about the manner in which security vetting was conducted where the applicant was applying for a sensitive post), article 8 did not require disclosure of the security material. In the present case, the complaint is about the decision not to allow a person to remain in a post where security vetting was employed. There can be no distinction in principle between the two cases. A related point is that in all cases where security clearance is sought, it is because the individual has volunteered to undergo the clearance process for the purpose of doing (or continuing to do) the job that he is employed to do. He must be taken to know that checks will be made that may produce material that cannot be shown to him. As Lord Hope points out, he is a volunteer.

160. I would add the following points which reinforce the Home Office case. First, the subject-matter of the claim is a claim for damages for alleged discrimination. I do not wish to underestimate the importance of the right not to be subjected to discrimination. But on any view, discrimination is a less grave invasion of a person's rights than the deprivation of the right to liberty. Secondly, the issues in the present case are such that the presence of an independent court and a special advocate are likely to go a long way to making up for the fact that Mr Tariq will be unable fully to participate in the proceedings. As I have explained at para 147 above, there is likely to be only limited (if any) scope for Mr Tariq to be able to give instructions to the special advocate which are necessary to enable her to test the Home Office case effectively.

Conclusion

161. I would, therefore, allow the Home Office's appeal primarily on the ground that this case concerns a decision taken in the context of security vetting. In other classes of civil case which are outside the surveillance/security vetting context, the balance between the individual's article 6 rights and other competing interests may be struck differently. It is said that this gives rise to undesirable uncertainty. But much of the content of the European Convention on Human Rights is about striking balances. This is sometimes very difficult and different opinions can reasonably be held. As a consequence, outcomes are sometimes difficult to predict. This is inevitable. But it is not a reason for striving to devise hard and fast rules and rigid classifications. It is, however, at least possible to say that, in principle, article 6 requires as much disclosure as possible. It is very easy for the state to play the security card. The court should always be astute to examine critically any claim to withhold information on public interest grounds.

162. For the reasons that I have given, I would allow the Home Office appeal. I would also dismiss the appeal of Mr Tariq for the reasons given by Lord Mance.

LORD PHILLIPS, LADY HALE AND LORD CLARKE

163. I agree that, for the reasons given by Lord Hope, Lord Brown, Lord Mance and Lord Dyson, the appeal of the Home Office should be allowed and that the cross-appeal of Mr Tariq should be dismissed.

LORD RODGER

164. Lord Rodger, who died before judgment was given in this case, had indicated that he agreed with the judgments of Lord Mance and Lord Brown.