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Case No: PTA/6/2006
PTA/33/2006
PTA/4/2007
PTA/23/2008
PTA/13/2009
PTA/4/2006
PTA/34/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF APPLICATIONS PURSUANT TO THE PREVENTION OF TERRORISM ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2010

Before :

MR JUSTICE SILBER

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Applicant**
- and -	
AF	**Respondent**
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Applicant**
- and -	
AE	**Respondent**

- -
- -

Tim Eicke and **Andrew O' Connor** (instructed by **Treasury Solicitor**) for the **Applicant**
Timothy Otty QC and Zubair Ahmad (instructed by **Middleweeks** of Manchester) for the **Respondent AF**
Tim Owen QC and **Ali Naseem Bajwa** (instructed by **Chambers** of Bradford) for the **Respondent AE**

Hearing dates: 15 and 16 December 2009

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Judgment

MR JUSTICE SILBER:

I Introduction

1. AE and AF (who will collectively be referred to as "the controlees") were each the subject of non-derogating control orders made by the Secretary of State for the Home Department ("the Secretary of State") under section 3(1) of the Prevention of Terrorism Act 2005 ("PTA"). During applications and hearings relating to all these control orders, the Secretary of State relied on closed material, which on grounds of national security was not disclosed to the controlees, whose interests were represented by special advocates at the closed hearings under section 3(10) of the PTA. The controlees contended that as they had not been told the gist of the case against them, neither of them had had a fair hearing which complied with article 6 of the European Convention on Human Rights ("the ECHR").

2. The control orders against both controlees have now been revoked by the Secretary of State as a result of the decision of the House of Lords in **Secretary of State for the Home Department v AF (No. 3)** [2009] 3 WLR 74 ("AF (No. 3)"), which required the Secretary of State to disclose substantially more of the closed information to the controlees and a third appellant AN than he had done previously. The three issues raised on these applications concern the effect of this decision and they are: first whether the control orders should be only regarded as revoked from the dates of revocation, or quashed or revoked ab initio, or from a later date but prior to the actual date of revocation (I interject to state that I do not consider that revoking *ab initio* is different from quashing it and I will use the term "quashing" to refer to any form of revocation with retrospective effect.); second whether the duty of disclosure explained by the House of Lords in **AF (No. 3)** which led to the control orders being revoked applies to a claim for damages by a controlled person arising out of the imposition of a control order upon him; and third whether the controlled persons are entitled to their costs of the earlier proceedings in this court. I will consider these issues against the context of the open facts of the cases concerning AE and AF but I have not been shown any closed evidence and there have been neither closed hearings nor closed submissions and a special advocate was not appointed.

II The Facts

3. The relevant procedural history in respect of AE's control orders can be summarised as follows:

   (a) On 18 May 2006, AE was served with a control order (PTA/4/2006) imposing inter alia, an 18 hour curfew. On 28 June 2006, Sullivan J held in **Secretary of State for Home Department v JJ & Others** [2006] EWHC 1623 (Admin) that control orders including curfews of such length constituted deprivations of liberty and were therefore ultra vires and fell to be quashed ab initio. Sullivan J's decision was upheld on 1 August 2006 by the Court of Appeal in **Secretary of State for Home Department v JJ and Others** [2007] QB 446 and on 31 October 2007 by the House of Lords in **Secretary of State for Home Department v JJ and Others** [2008] 1 AC 385. AE was deprived of his liberty by PTA/4/2006 between 18 May and 11 September 2006, i.e. for 116 days.

(b) On 12 September 2006, the Secretary of State revoked the control order in PTA/4/2006 and made a further control order PTA/34/2006 in its place imposing, inter alia, a 14 hour curfew. This order was renewed on three occasions, in September 2007, 2008 and 2009. Its terms varied over time and included a 14 hour curfew between 12 September 2006 and 30 October 2007 (412 days), a 16 hour curfew between 31 October 2007 and 2 April 2009 (518 days), a 12 hour curfew between 3 April 2009 and 2 September 2009 (152 days) and a 10 hour curfew between 3 September 2009 and 22 September 2009 (20 days). AE was restricted by PTA/34/2006 between 12 September 2006 and 22 September 2009, i.e. for 1,104 days.

(c) On 22 September 2009, the Secretary of State revoked AE's control order in the light of the decision in **AF (No.3)**.

(d) In total, AE has been restricted by the two control orders (PTA/4/2006 and PTA/34/2006) between 18 May 2006 and 22 September 2009, i.e. for 1,221 days, which is about 3years and 7 months.

4. In the case of AF's control orders, the relevant history may be summarised as follows:-

(a) On 2 June 2006, AF was served with a control order imposing, inter alia, an 18-hour curfew and a geographical boundary restriction for the remaining 6 hours ("PTA/6/2006"). On 1 August 2006, the Court of Appeal held in **Secretary of State for Home Department v JJ and Others** [2007] QB 446 that control orders including curfews of such length constituted deprivations of liberty and were therefore ultra vires and fell to be quashed ab initio. The Court of Appeal's decision in this regard was upheld by the House of Lords in **Secretary of State for Home Department v JJ and Others** [2008] 1AC 345. AF had been deprived of his liberty by PTA/6/2006 for 102 days.

(b) On 11 September 2006, Secretary of State revoked the control order in PTA/6/2006 and made a further order in its place imposing, inter alia, a 14-hour curfew and a geographical boundary restriction for the remaining 10 hours ("PTA/33/2006"). On 30 March 2007, Ouseley J held that this control order also constituted a deprivation of liberty and was ultra vires and fell to be quashed ab initio. AF had been restricted by PTA/33/2006 for 231 days.

(c) On 30 March 2007, the Secretary of State made a further control order imposing, inter alia, a 12-hour curfew and a geographical boundary restriction for the remaining 12 hours ("PTA/4/2007"). This order was renewed on two occasions (under PTA/23/2008 and PTA/13/2009) and was ultimately revoked by Secretary of State on 27 August 2009, following the decision of the House of Lords in **AF (No. 3).** AF had been restricted by PTA/4/2007 for 2 years and 149 days. Its terms varied over time and included a period between 1 November 2007 and 29 March 2009 when AF was subjected to a 16-hour curfew.

(d) In a judgment dated 31 October 2007, the House of Lords held unanimously that control orders with 12 and 14 hour curfews did not amount to a breach of Article 5 – see **Secretary of State for the Home Department v MB and AF**

[2008] 1 AC 440. Consequently, Ouseley J's order dated 30 March 2007 and referred to in sub-paragraph (b) above quashing PTA/33/2006 was reversed.

(e) During the currency of his various control orders, AF has also been detained on remand for alleged breach of the orders. He was detained for alleged breach of PTA/33/2006 for 85 days between 5 January 2007 and 30 March 2007. The Crown offered no evidence to these charges following the decision of Ouseley J on 30 March 2007. He was also detained for alleged breaches of PTA/4/2007 on 3 occasions between 30 July 2007 and 20 March 2009 for periods totalling 99 days. The charges in relation to these alleged breaches remain pending and his trial at the Central Criminal Court in respect of these matters has been adjourned to await the outcome of these proceedings.

(f) In total, AF had been restricted by the control orders imposed on him for a total of 3 years and 15 days.

(g) Lord Phillips explained in **AF (No. 3)** in relation to the material available when all the control orders against AF were made that: -

> *"23...It is common ground that the open material did not afford the Secretary of State reasonable grounds for suspicion of involvement by AF in terrorism-related activity. The case against him was to be found in closed evidence"*

5. There were broadly similar restrictions imposed on AE and AF, which were in addition to the curfews to which I have referred. Those imposed on AF were described by Lord Bingham in the case of **Secretary of State for Home Department v MB and AF** (supra) in this way at pages 468-469:-

> *"7… He was required to wear an electronic tag at all times. He was restricted during non-curfew hours to an area of about 9 square miles bounded by a number of identified main roads and bisected by one. He was to report to a monitoring company on first leaving his flat after a curfew period had ended and on his last return before the next curfew period began. His flat was liable to be searched by the police at any time. During curfew hours he was not allowed to permit any person to enter his flat except his father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor's name, address, date of birth and photographic identification. He was not to communicate directly or indirectly at any time with a certain specified individual (and, later, several specified individuals). He was only permitted to attend one specified mosque. He was not permitted to have any communications equipment of any kind. He was to surrender his passport. He was prohibited from visiting airports, sea ports or certain railway stations, and was subject to additional obligations pertaining to his financial arrangements."*

6. Lord Bingham then summarised the wide-ranging and inhibiting effect of these restrictions on AF in this way on page 469: -

> "8. *In his judgement, Ouseley J summarised the evidence given by AF concerning the impact of the order upon him. He had three times been refused permission to visit his mother. His sister and her family were unwilling to visit because of the traumatic experience of one child when AF was first arrested. Friends were unwilling to visit. He only had one Libyan or Arabic-speaking friend in the area he was allowed to frequent, which was not the area to which he had gravitated before. He was not permitted to attend the mosque he had attended before, and was confined to an Urdu-speaking mosque; he could not speak Urdu. He could not visit his Arabic-speaking general practitioner. He could not continue his English studies, since there were no places at the college in his permitted area. He was cut off from the outside world (although, as was pointed out, he had television access to Al Jazeera). The judge very broadly accepted AF's account of the effects of the control order on him, and of his reaction to those effects …while noting certain elements of overstatement and exaggeration…. The judge concluded that the effects of the control order as described by AF were the effects which the restrictions were intended to have…"*

7. On 10 June 2009, the House of Lords unanimously allowed appeals by the controlees and another controlee AN from a majority decision of the Court of Appeal [2008] 4 All ER 340 on the grounds that the effect of the decision of the European Court of Human Rights ("the Strasbourg Court") in **A v United Kingdom** (Application No.3455/05) The Times, 20 February 2009: -

> *"59.. establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions 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"* (per Lord Phillips of Worth Matravers (with whom the other members of the Appellate Committee agreed) in **Secretary of State for the Home Department v AF (No.3)** [2009] 3 WLR 74, 98-99).

8. As a result of this decision, the Secretary of State revoked the control order of AF by a letter dated 27 August 2009 and the control order of AE by a letter dated 22 September 2009 having explained that he "*has given careful consideration to the judgment of the House of Lords in AF (No.3), his obligations under article 6 ECHR in light of that judgment and the disclosure which, in his view, he will be required to give AE in order to give effective instructions to the special advocate"*. The Secretary of State concluded that "*he is not willing to make the disclosure required*". As I will explain, the unwillingness of the Secretary of State to give disclosure of closed

material is very significant, particularly as it led to the control orders not remaining in force.

III The Issues

9. As I have explained, the parties have agreed that the issues to be resolved on these applications as amended during the hearing are:

   A. Whether in circumstances where the requirements of Article 6 of the European Convention compel the Secretary of State to withdraw the material relied upon in support of a control order such that the order cannot be maintained the Court should:
   i. Quash the control order (and any relevant renewals) *ab initio* or direct revocation with retrospective effect; or
   ii. Direct the revocation of the control order with prospective effect only (to the extent that this has not occurred) ("The Quashing/ Revocation Issue") (see paragraphs 14 to 89 below);

   B. Whether the disclosure requirements identified in **AF (No. 3)** apply to a claim for damages by a controlled person arising out of the imposition of a control order upon him ("the Damages Claim Issue") (see paragraphs 90 to 112 below); and

   C. Whether a Respondent to control order proceedings is entitled to recover the costs of those proceedings where the control order is quashed or revoked (either prospectively or retrospectively) as a result of the Secretary of State's election not to disclose further material so as to comply with the requirements of Article 6 of the Convention" ("The Costs Issue") (see paragraphs 113 to 118 below).

10. The case for the Secretary of State is that as to issue (a), the control order is to be revoked but solely with prospective effect ; as to issue (b) he is not required to disclose closed material in accordance with the decision in **AF (No. 3)** in any claim for damages made by the controlee as a result of the imposition of the control order; and as to issue (c), as the orders are to be revoked prospectively, there should be no order as to costs.

11. The controlees submit that in respect of issue (a), the control order should be quashed ab initio or revoked ab initio or at least from the date when the Secretary of State should have been put to his election of either disclosing to the controlee the closed material as required by the House of Lords or not relying in it; as to issue (b), he is required to disclose closed material in accordance with the decision in **AF (No. 3)** in any claim for damages made by the controlee as a result of the imposition of the control order; and as to issue (c), the controlees are entitled to recover their costs from the Secretary of State in the event of revocation of his control order.

12. At this stage, it is appropriate to record two matters, which are common ground between the parties. First, it is agreed that the cases of AE and AF stand or fall together in the sense that the issues that have to all be resolved in the same way

against each of them and indeed the submissions made for and against each of them are identical. So I will not look at the evidence on different issues in respect of each of them but on occasions, I will merely comment on the position of one of them although I have no reason to believe that the effect on each of them was not similar and in both cases, they were not told sufficient of the case against them so as to give proper instructions to their legal advisers.

13. Second, the Secretary of State accepts that the control orders which imposed an 18-hour curfew to which AF and AE were subject in the period June 2006 to September 2006 and May 2006 and September 2006 respectively amounted to a deprivation of liberty and have to be quashed ab initio. The Secretary of State does not dispute his liability for false imprisonment and for breach of article 5(1) of the ECHR, subject to his primary case that the article 5(1) claim is statute-barred but I do not have to say anything more about them as that issue has not been the subject of any application during the present hearing.

IV. The Quashing/ Revocation Issue

(i) Introduction

14. It is common ground that where as in this case control orders were flawed, the powers of the court are set out in section 2(12) of the PTA, which provides that: -

> *"If the court determines, on a hearing in pursuance of directions under subsection (2)(c) or (6)(b)(c), that a decision of the Secretary of State was flawed, its only powers are:*
>
> (a) power to quash the order;
>
> (b) power to quash one or more obligations imposed by the order; and
>
> (c) power to give direction to the Secretary of State for the revocation of the order or for the modification of the obligation it imposes".

15. As I have explained in paragraph 8, the Secretary of State has revoked the control orders against both AE and AF and the issue now arises as to whether additional relief should be granted. The case for AE and AF as presented respectively by Mr. Tim Owen QC and by Mr. Timothy Otty QC is that each of the control orders must be quashed or alternatively revoked *ab initio*, or at a time prior to the date when the Secretary of State revoked them. As I have explained, I do not consider that revoking *ab initio* is different from quashing it and I will use the term "*quashing*" to refer to any form of revocation with retrospective effect.

16. Mr. Tim Eicke counsel for the Secretary of State disputes these claims and he contends that the proper course is that the control orders should be revoked but only with effect from the date of revocation. He submits that:-

(a) I should follow the decision of Mitting J in the case of **Secretary of State for the Home Department v AN** [2009] EWHC 1966 (Admin) refusing to quash a control order but merely to revoke it with effect from the date of revocation;

(b) Article 6 has no role at all in relation to the Secretary of State's actions in relation to control orders because the role of the Secretary of State was merely to make administrative decisions, which do not engage article 6;

(c) in making the decision to apply for and subsequently make control orders, the Secretary of State is not inhibited from placing reliance on material which may subsequently prove not to be admissible in court proceedings;

(d) even if there was *power* to quash or to revoke the control orders with effect from a date prior to their revocation, such powers should not on the facts of the present cases be exercised so as to have retrospective effect ;

(e) insofar as there is a discretion whether to quash or to revoke the control orders, the discretion should be exercised in favour of revoking them solely with prospective effect and not to quash them; and

(f) If (contrary to the Secretary of State's primary case) the control orders are to be quashed, the quashing should be with effect from a date after that on which they were made.

17. In response, Mr Otty and Mr Owen both challenge each of these contentions and they both submit each control order should be quashed. There is also some uncertainty as to whether there was a power to quash or revoke the control orders ab initio or with effect from a date prior to their revocation but before dealing with these points, it is appropriate to deal with a preliminary matter as to whether either **A v UK** or **AF (No.3)** have solely prospective effect because if they do, this would indicate that the control orders should not be quashed.

*(ii) Do the decisions in **A v UK** and **AF (No.3**) have solely prospective effect?*

18. It is necessary to recall that the House of Lords accepted that, prior to the decision in **A v UK,** the law in this country was that there was not invariably an irreducible amount of closed material, which had to be disclosed to a controlled person **(AF (No.3**) [38] per Lord Phillips and [84] per Lord Hope). So **A v UK** and **AF (No. 3)** constituted radical changes when the law was stated in the way in which I explained in paragraph 7 above. The case for the controlees on this first issue depends on establishing that these two cases do not have only prospective effect but also that they have retrospective effect as the control orders in both cases were made in 2006, which was almost three years before these two cases were decided. As to **A v UK**, it is appropriate to bear in mind that where the Strasbourg Court seeks to make the effect of its judgments prospective only and not retrospective, it then states this intention expressly in its judgment (see **R (on the application of Colin Richards) v Secretary of State for the Home Department** [2004] EWHC 93 (Admin) [69]-[80]). There is

nothing in **A v UK**, which indicates that the Strasbourg Court intended that its decision should have only prospective effect.

19. Turning to the English case of **AF (No. 3),** the position in English law on whether decisions should only have prospective effect was considered by the House of Lords in **R v Governor of Brockhill Prison ex parte Evans (No.2)** [2001] 2 AC 19, which was a case in which the release date of prisoners had been calculated on the authority of judicial decisions, which had been subsequently overruled. The issue was whether this overruling was to be merely prospective and the House of Lords unanimously held that the applicant's detention based on and in accordance with those overruled decisions had never been lawful because the judicial decision overruling those decisions applied retrospectively to cover their periods of detention.

20. On the issue of prospective overruling, Lord Slynn of Hadley said that, *"there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants*" (page 26h). Lord Steyn said of the idea of prospective overruling that :-

> *"without shutting the door on the possibility of such a development by a decision or practice statement of the House, I would say that it is best considered in the context of a case or cases where the employment of such a power would serve the ends of justice" (page 29f).*

21. Lord Hope of Craighead considered that **Evans'** case was: -

> *"not an appropriate case for detailed consideration of these arguments [on prospective overruling]… If ever there was a case where the declaratory theory should be applied, it must be one where the liberty of the subject is in issue - as it plainly is where the point relates to the entitlement of the subject to be released from custody" (page 37a-b).*

22. Lord Hobhouse of Woodborough stated that: -

> *"Anything said about the doctrine of "no-retrospectivity" will be obiter and is best left over to a case which requires its decision. It is extremely doubtful that there will be any such case" (pages 47h-48a).*

23. Lord Browne Wilkinson explained that he did not express any view on the merits of introducing a doctrine of prospective overruling (page 27e). It would be fair to say that although the possibility of prospective overruling was not ruled out by the House of Lords, it could only be used in exceptional circumstances, which in the opinion of Lord Hope of Craighead, would not have included a case where the liberty of the subject was involved, such as where the point relates to the entitlement of the subject to be released from custody. That point is relevant to the present case where the liberty of the controlees was impaired by the very comprehensive terms of the control orders, which were imposed on them and which were renewed.

24. The effect of those decisions is that both the Strasbourg Court decision in **A v UK** and that of the House of Lords in **AF (No.3)** have not merely prospective effect but each of them also has retrospective effect. That leaves open the problem of whether the retrospective nature of those two decisions means that the control orders imposed on the controlees should be quashed or merely revoked.

*(iii)The decision of Mitting J in **AN***

25. **AN** was the third case which was heard with AF and AE and which was the subject of the judgment in **AF (No.3)** and which was also remitted for further consideration by the House of Lords. On 15 July 2009, the Secretary of State indicated that he would withdraw reliance on closed information on which he had been put to his election as to whether to rely on it or to disclose it to the controlee. Mr Eicke submits that I should follow the decision of Mitting J, who decided that the decision to make the original control order was not a nullity and that he was not "*required by the application of ordinary judicial review principles to quash the order*" [4] but that he had a discretion as to whether he was not bound to quash the control order or to give directions for its revocation [4]. His conclusion was that, for reasons that I will set out in paragraph 60 below, he would not exercise his discretion to quash the order; and indeed, he did not do so [5].

26. Of course, every decision of Mitting J especially on control orders deserves great respect in the light of his unrivalled experience and expertise in dealing with these matters. The hearing before Mitting J took place on 16 July 2009, which was the day after the Secretary of State had withdrawn reliance on the closed material and so counsel would have had very little time in which to prepare for the submissions before Mitting J on whether the control order should be revoked or quashed. Indeed I gather that the matter was listed for directions as the Secretary of State had indicated on the previous day that he was intending to make further open disclosure. Not surprisingly, Mr Owen and Mr. Andrew O'Connor (who appeared also respectively for AN and the Secretary of State on that occasion) both agreed that there was very limited argument on the issue of whether the control orders in that case should be quashed or revoked in front of Mitting J in the **AN** case with no skeleton arguments having been lodged by either side and very few cases being cited. Indeed, that is clearly apparent from the judgment and that contrasts with the position in the present case in which I have received more than 70 pages of written skeleton arguments as well as very detailed and thoughtful oral submissions for which I must express my gratitude. Thus, I have had the benefit of much more detailed submissions and citations than Mitting J received. It might well have been that if Mitting J had had the benefit of these submissions and citations he might not have reached the same decision. Nevertheless I will only not follow his judgment if I am "*convinced that the judgment is wrong*" (**R v Greater Manchester Coroner ex parte Tal** [1985] QB 67, 81a-b). I will return later in this judgment in paragraph 80 and 86 to consider his judgment in respect of which permission to appeal has been granted and a hearing date has been fixed for February 2010.

(iv) The Power to Quash Control Orders ab initio

27. Although the Secretary of State in his skeleton argument accepted that the court had ample powers to quash the control orders ab initio, I understood Mr Eicke in his oral

submissions to submit that no power existed because article 6 did not feature in the matters listed for mandatory review in section 3(10) of the PTA which states that:-

> *"On a hearing in pursuance of direction under sub-section (2)(c) or (6)(b) or (c), the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed-*
>
> *(a) his decision that the requirements of section 2(1)(a) and (b) were satisfied for the making of the order; and*
>
> *(b) his decisions on the imposition of each of the obligations imposed by the order".*

28. This submission, is inconsistent with the statement of Mitting J that "*I accept I have discretion whether to quash the order or give directions for it to be revoked*" [5]. I respectfully agree that I have power to quash a control order *ab initio* for at least four reasons.

29. First, Baroness Hale said after hearing submissions in a part of her speech which is of importance on other issues in this case, as I will explain in paragraph 66 below, that in relation to material on which the Secretary of State cannot rely:-

> "*if the Secretary of State cannot rely on it and it is indeed crucial to the decision, then the decision will be flawed and the order will have to be quashed*" **Secretary of State for the Home Department v MB & AF** [72].

30. Second, section 3(11) of the PTA provides that "*in determining.. (b) the matters mentioned in sub-section (10), the court must apply the principles applicable on an application for judicial review*". Such principles would include the conventional judicial review ground of challenge by reason of errors of law, which could lead to a decision being quashed. In this case, the Secretary of State's decisions in making and renewing the control orders were tainted by an error of law by failing to comply with the article 6 rights of the controlees and so the court has the power to quash the order.

31. Third, the decision of the House of Lords in **JJ v Secretary of State for the Home Department** [2008] 1 AC 385 shows that the court has power to quash a control order which failed to respect the claimant's article 5 rights. This decision shows the fact that the court had itself given permission to make the control order did not constitute a barrier to this conclusion and nor did the wording of section 3(10). By parity of reasoning, a control order which fails to respect article 6 rights of controlees can also in appropriate cases be quashed. Fourth, in **AF (No. 3)** Lord Hope (with whom Lord Scott agreed) explained that if the controlee does not have the possibility to challenge the allegations against him *"the judge must exercise the power he is given by section 3(12) of the PTA 2005 and quash the control order"* [82].

(v) Who is responsible for the Breach of the Controlees' article 6 Rights? Is it the Secretary of State or is it the Courts?

32. The Secretary of State contends that the obligations owed to the controlees under article 6 relate to the *court's* functions and duties but not to the administrative action taken by the Secretary of State before, when and after the control orders were made and renewed. It is said by Mr. Eicke that under article 6, it is the *court's* duty to ensure a fair hearing in accordance with article 6 and therefore any remedy for a failure to ensure a fair hearing lies by definition against the *court* and not against the Secretary of State. So any breach of article 6 is in the words of the Secretary of State's written skeleton argument of 14 December 2009 "*not the responsibility of the Secretary of State but the sole responsibility of the courts.*"

33. Mr Eicke points out that section 7(1) of the Human Rights Act 1998 ("HRA") provides that "*A person who claims that a public authority has acted.. in a way which is made unlawful by section 6(1) [namely by acting "in a way which is incompatible with a Conventional right"] may – (a) bring proceedings against the authority under this Act in the appropriate court or Tribunal..*". Section 9(1) of the HRA provides that such procedures "*may be brought only (a) by exercising the right to appeal.. or.. (c) in such other forum as may be prescribed by the rules*".

34. I was reminded that under paragraph 4(3)(d) of the Schedule to the PTA, it is provided that: -

> *"Rules of court made in an exercise of the relevant powers must secure …(d) that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest"*.

35. In my view, these submissions fail to appreciate the role of the Secretary of State because non-derogating control orders of the kind made against AE and AF are not court orders but are orders made by the Executive in the form of the Secretary of State. This is clearly apparent from the terms of the PTA because: -

i) Section 1(2) of the PTA states (with my emphasis added) that "*the power to make a control order against an individual shall be exercisable – (a) except – (in circumstances which do not apply in this case) by the Secretary of State*";

ii) Section 2 of the PTA deals with the making of non-derogating control orders and provides that the *Secretary of State* may make control orders and section 2(6) of the PTA enables *the Secretary of State* to renew non-derogating control orders for a period of 12 months;

iii) Section 3 of the PTA gives the court some involvement but that is adequately described by the marginal note to section 3 as "*Supervision by the court of making of non-derogating control orders*";

(d) Section 3(2) of the PTA shows that the role of the court is to consider whether the decision of the *Secretary of State* to seek permission to make a non-derogating control order is "*obviously flawed*"; Section 3(3) of the PTA deals with the duties of the court where the *Secretary of State* has made a non-derogating control order without the court's permission;

(e) Section 3(6) and (8) of the PTA give the court's powers in relation to non-derogating control orders where it considers decisions and certificates of the *Secretary of State* were flawed;

(f) Section 3 (10) of the PTA requires the court to consider if *decisions of the Secretary of State* relating to the making of the non-derogating control order and each of its obligations to be flawed; and because

(g) Section 7(2) of the PTA provides that the *Secretary of State* may at any time revoke a non-derogating control order, relax or remove any obligation in it or with the consent of the controlled person modify any obligations imposed by it.

36. These features distinguish the role of the Secretary of State in making control orders from his role when, for example, he brings a private law claim for damages or an injunction or a public law claim for judicial review. After all, unlike the Secretary of State in relation to control orders, a party to litigation does not have the power to make an order without the court's intervention or the right to revoke it, to relax it or to remove any obligation in it without the court's intervention or perhaps more importantly to renew it as was done in the case of AE on three occasions in 2007, 2008 and 2009 and in AF's case on two occasions in 2008 and 2009. The Secretary of State was solely responsible for the renewals of the control orders. As Mitting J. explained in **Secretary of State for Home Department v AT and AW** [2009] EWHC 512 (Admin) [19]: -

> *"Parliament has entrusted the decision whether or not to make a non-derogating order to a minister responsible to Parliament. It is not for me, as a judge, to make the decision".*

37. Indeed the reason why it is the Secretary of State and not the courts who make the decisions whether or not to make control orders is, as Mitting J also explained in the **AT and AW case,** that:-

> *"…as MB makes clear, the Secretary of State is better placed than the Court to decide the measures which are necessary to protect the public from terrorism-related activities by the individual concerned" [19].*

38. In reaching that conclusion, I have not overlooked the submission of Mr Eicke that Ouseley J stated in **Secretary of State for Home Department v AF** [2007] EWHC Admin 651 [168] that article 6 goes to *"the court's own functions and duties"*, which it is said by Mr Eicke means that the acts of the Secretary of State are outside the ambit of article 6. In that case, the judge was not resolving the issue with which I am concerned but a different issue and he was not seeking to comment on the role of the Secretary of State. The recent decision in **R (Wright) v Secretary of State for Health and another** [2009] 1 AC 739 shows that the defendant minister in that case owed duties under article 6 in respect of the registration of care workers because he or

she was taking decisions in what article 6 (1) of the ECHR describes as "*in the determination of civil rights"*.

39. The decisions by the Secretary of State to make and to renew the control orders to which AE and AF were subject also constituted in the words of article 6 "*the determination of.. civil rights*" and the decision in **AF (No. 3)** bears that out. There is a right by controlees to challenge in the courts control orders made by the Secretary of State and in hearing that challenge, the courts will decide whether the article 6 rights of the controlees have been protected. The appropriate approach in determining if those rights have been protected is now to be found in the speech of Baroness Hale in **Wright** (supra) with which all other members of the Appellate Committee agreed when she stated (with my emphasis added) that:-

> "23. *The difficult question [which] is how the requirements of article 6(1) apply in a case such as this. It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises 'full jurisdiction'…What amounts to 'full jurisdiction' varies according to the nature of the decision being made.. It does not always require access to a court or a tribunal even for determination of dispute issues of fact. Much depends on the subject matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, to supply the necessary access to a court, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example…*" (**R (Wright) v Secretary of State for Health and another** at page 750.

40. The facts in the **Wright** case are of some relevance because care workers had challenged the regime by which the Secretary of State provisionally placed the names of the claimant care workers on a list of people considered unsuitable to work with vulnerable adults without giving them a prior hearing. Having explained the legal principles which I have set out in paragraphs 39, Baroness Hale concluded that "*The process does not begin fairly, by offering the care worker an opportunity to answer the allegations made against her, before imposing upon her possibly irreparable damage to her employment or prospects of employment*"[28]. In other words, the procedure in that case did not satisfy the important requirement of being "*fair"* because the care workers were not given an opportunity to answer the allegations against them before an order was made against them.

41. The position of the controlees is weaker in some ways than that of the care workers because unlike the care workers, the controlees were not given notice before the control orders were made and indeed still have not been given the details of the case against them or an opportunity to answer the allegations against them for the reasons explained in **AF (No.3**). The reason for this failure is because of what is now regarded as the inadequate procedure of using special advocates in order to satisfy article 6 obligations without making any adequate disclosure to the controlees of the crucially important closed evidence so that they can give instructions in relation to it.

In the case of AF, this is a serious matter because as I have already explained in paragraph 4 (g) above the case against him was to be found solely in the closed evidence. The effect of the control orders was not merely to impose very great restrictions on the controlees as I have already explained in paragraphs 3 to 6 above for more than three years but also to seriously stigmatise the controlees as people who the Secretary of State has reasonable grounds for suspicion of involvement in terrorist-related activities and against whom he considers it necessary for purposes connected with protecting members of the public from a risk of terrorism to impose a control order (section 2 (1) of the PTA).

42. Therefore, although the decisions of the Secretary of State in the present cases were challenged in the courts, those courts do not enjoy "*full jurisdiction*" because of the closed procedure, which did not comply with article 6 (1) as the controlees first did not know the details of the cases against them and second are still unable to answer the closed evidence which, as I have explained, in the case of AF constituted the entire case against him. In other words, the decision in **AF (No. 3)** establishes that the court did not have the appropriate jurisdiction as the total case against AF was in the closed material.

43. It is appropriate now to deal with a submission of Mr. Eicke that the Secretary of State might well have disclosed closed material to the controlees at an earlier stage if the decisions in **AF (No. 3)** or **A v UK** had been given earlier. I am unable to agree as in the absence of any contrary evidence, it is reasonable to conclude that the Secretary of State would have behaved as he actually did after judgment in **AF (No. 3)** was delivered and revoke the orders rather than disclose the closed evidence as I have explained in paragraph 8 above. The Secretary of State was the only person who could have adduced evidence to show that a different course would have been adopted earlier if the decisions in **AF (No. 3)** or **A v UK** had been given earlier. After all, he was the person who would have made that decision and neither the controlee nor any other party could have given that or similar evidence. Indeed, if the true position was that he would have made disclosure in accordance with **AF (No. 3)** if that decision had been made earlier, he would no doubt have adduced such evidence explaining that fact or at the very least he would have given some reason to suggest that the contrary would have followed if that had been the case. Instead, very significantly the Secretary of State elected not to do so. This very significant omission leads to my conclusion that whenever the decisions in **A v UK** and **AF (No.3)** had been given at or after the time when the control orders were made against the controlees, the Secretary of State would have refused to disclose the closed material but instead he would have revoked the control orders as indeed he actually did after the House of Lords had given its decision in **AF (No.3)**. In other words, what the Secretary of State did after that decision was given indicates in the absence of contrary evidence what he would have done earlier if **AF (No.3)** had then been decided..

44. I therefore reject the contention of Mr. Eicke that the obligations owed to the controlees under article 6 relate to the court's functions and duties and not to the actions taken by the Secretary of State before or as a consequence of the control orders being made. The procedures adopted for scrutinising the decisions of the Secretary of State for the Home Department to issue the control orders did not meet Baroness Hale's requirement of being "*fair*" for the reasons explained in **AF (No. 3).**

(vi) In taking decisions in the interests of national security, is the Secretary of State inhibited from placing reliance on material, which may subsequently prove not to be admissible in court?

45. Mr Eicke contends that the Secretary of State was not inhibited from placing reliance on material when obtaining the control orders, which might subsequently be inadmissible in court and he relies in support on statements, which were made by members of the House of Lords in the case of **A & Others v Secretary of State for the Home Department (No.2)** [2006] 2 AC 221 in which Lord Bingham said that:-

> "*47… This suggests that there is no correspondence between the material on which the Secretary of State may act and that which is admissible in legal proceedings.*
>
> *48. This is not an unusual position. It arises whenever the Secretary of State (or any other public official) relies on information which the rules of public interest immunity prevent him from adducing in evidence… It is a situation which arises where action is based on a warranted interception and there is no dispensation which permits evidence to be given. This may be seen as an anomaly, but, ..it springs from the tension between practical common sense and the need to protect the individual against unfair incrimination. The common law is not intolerant of anomaly*".

46. Lord Nicholls [68-71], Lord Hoffman [93] and Lord Brown [162] and [171] made similar statements. The argument of Mr Eicke proceeds on the basis that article 6 is concerned exclusively with procedural protection available in the context of proceedings before a court in which an individual's civil rights and obligations are determined but that article 6 in the words of his skeleton argument is "*not capable per se of invalidating the prior (administrative) decision-making process that led to the proceedings in question*".

47. I am unable to accept this submission because when the court considers the lawfulness of an executive action, it is entitled to, and indeed must, do so by reference to material properly admissible before a court. In so far as there is a mismatch between the ability of the executive to use matters which might later be inadmissible this, as was explained by Lord Nicholls in **A & Others,** "*arises from the perceived need to preserve confidentiality not from the application of a broad moral principle*"[72].

48. I cannot accept the Secretary of State's characterisation of his role in respect of making and renewing control orders as "*a purely administrative decision*", which is similar to obtaining the search warrant as this submission fails to appreciate first the dramatic consequences of a control order which I explained in paragraphs 5 and 6 above, second the inability of the controlees in the present cases to challenge the orders because they did not know much of the evidence relied on by the Secretary of State and perhaps most importantly third the significant role of the Secretary of State to which I have already referred in paragraphs 35 to 37. Not only do the terms of such orders interfere with ordinary civil rights for long periods but also they are supported by sanctions, which include punishment for non-compliance including a

maximum term of imprisonment of up to five years. I am unable to find any support for any aspect of the Secretary of State's case from the passages cited in **A & Others** for at least two reasons.

49. First, if Mr. Eicke's submissions were correct, it is difficult to understand why the House of Lords in **AF (No. 3)** reached the decision which it did, because the Secretary of State would then have been able to rely on closed material without infringing the article 6 rights of the controlees. It is noteworthy that **A & Others** was referred to in the arguments before the House of Lords in **AF (No. 3)** (see [2009] 3 WLR at 76E). What is important is that none of the members of the House of Lords considered that **A & Others** was of any relevance and certainly not of the decisive relevance, which Mr. Eicke now contends that it has.

50. Second, the decision of **A & Others** has now to be reconsidered in the light of the decision of the Grand Chamber in **A v UK**. Section 2 of the HRA states that a judge in this country "*must take into account*" any judgment of the Strasbourg Court. Furthermore as Lord Bingham explained in **R (Anderson) v Secretary of State** [2003] 1 AC 837, 879/880 [18] the House of Lords "*will not without good reason depart from the principles laid down in a carefully considered judgment of the Grand Chamber*". No good reason has been put forward as to why the approach to article 6 in **A v UK** should not be determinative. In other words, the decision and approach of the Grand Chamber in **A v UK** and its application in **AF (No.3)** must represent the law of this country even if it is inconsistent with the decision in **A & Others**. Indeed, as Lord Rodger famously said in **AF (No. 3)** "*Strasbourg has spoken, the case is closed"* [98].

(vii) Does the interim nature of control order applications mean that article 6 is not engaged?

51. Traditionally, preliminary proceedings were not considered to be determinative of civil rights and obligations and so they did not fall within the province of article 6 (see for example **Wright** (supra)[21]) in which Baroness Hale then proceeded to explain that there are some exceptions such as because "*some interim measures have such a clear and decisive impact upon the exercise of a civil right that article 6(1) does apply*"[21].

52. An example of this exception arose in **Markass Car Hire v Cyprus** (dec), Application No51591/99 (unreported 23 October 2001) when it was held that article 6 was engaged in respect of an interim decision when, as was subsequently explained by the Strasbourg Court: -

> *"…the measure requested was drastic, disposed of the main action to a considerable degree, and unless reversed on appeal would have affected the legal rights of parties for a substantial period of time" (**Micallef v Mortar GC** (Appl. 17056/06 (15 October 2009) [75]).*

53. In the **Micaleff** case, the Strasbourg Court thought that a change in its case law was necessary and it explained (with case names and references omitted) that: -

"80. Against this background the Court no longer finds it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor is it convinced that a defect in such proceedings would necessarily be remedied at a later stage, namely, in proceedings on the merits governed by Article 6 since any prejudice suffered in the meantime may by then have become irreversible and with little realistic opportunity to redress the damage caused, except perhaps for the possibility of pecuniary compensation. "

81. The Court thus considers that, for the above reasons, a change in the case- law is necessary. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement ...It must be remembered that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective…'".

54. The Strasbourg Court proceeded to conclude that not all interim measures would fall within the ambit of article 6 and that it would depend on whether certain conditions were satisfied and they were (with case references omitted) that:-

"*84. First, the right at stake in both the main and the injunction proceedings should be 'civil' within the autonomous meaning of that notion under Article 6 of the Convention …*

85. Second, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, article 6 will be applicable.

86. However, the Court accepts that in exceptional cases – where, for example, the effectiveness of the measure sought depends upon a rapid decision-making process – it may not be possible immediately to comply with all of the requirements of Article 6. Thus, in such specific cases, while the independence and impartiality of the tribunal or the judge concerned is an indispensable and inalienable safeguard in such proceedings, other procedural safeguards may apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In any subsequent proceedings before the Court, it will fall to the Government to establish that, in view of the purpose of the proceedings at issue in a given case, one or more specific procedural safeguards could not be applied

without unduly prejudicing the attainment of the objectives sought by the interim measure in question".

55. As to the requirement in paragraph 84 of that case, the right of the controlees at stake in the initial application and in all subsequent applications for and renewals of the control orders would be "*civil*" rights and that was the basis of the litigation, which culminated in the decision in **AF (No. 3).**

56. The second requirement in paragraph 85 of that case is also satisfied because of the nature and aim of the interim measure which was to limit the rights of the controlled person in a radical manner as I have explained in paragraphs 4 and 5 to something fairly close to house arrest with the consequence that they so completely changed the controlees' life limiting their ability to live and to move as they wished and to communicate freely with others with the result that the controlee's rights under article 6(1) were engaged. As I have explained in paragraphs 3 to 6 above the rights of AE and AF were greatly reduced for more than three years taking account of the renewals of the control orders. In my view the effect of all these restrictions on the controlees was sufficient to reach the threshold so that article 6 (1) is engaged.

57. It is noteworthy that in the **Wright** case, Baroness Hale pointed out ([19] and [21]) that article 6(1) applied to a suspension of a doctor from medical practice as in the case of **Le Compte, Van Leuven and De Meyre v Belgium** ((1982) 4 EHRR 1). As I explained in paragraphs 3 to 6 above, the restrictions on the controlees were of a different type but they were nevertheless still of a very significant nature.

58. In reaching that conclusion, I have not overlooked the fact that the restrictions applied to AE and AF when the control orders were served on them were not final in form because there was supervision by the court, but as I explained in paragraphs 28 to 31 above, that would eventually enable the court to revoke or to quash the order. What is clear is that these procedures take a long time as the chronologies set out in paragraphs 3 and 4 above show. Indeed those of us who have had experience of dealing with control orders appreciate how long it takes for such hearings to be fixed and completed taking account of factors such as the time for instructing special advocates as well as the availability of counsel, of witnesses and of secure courts for hearing the applications in which there was closed evidence.

59. So it is correct to describe the control orders obtained against AE and AF as first having the object and purpose of severely restricting their freedom; second of achieving that aim and third of being in force for lengthy periods. Thus, these control orders fall within the class of restriction which Baroness Hale described as "*some interim measures [which] have such a clear and decisive impact upon the exercise of a civil right that article 6(1) does apply*"[21].

(viii) Is the court obliged to quash the control orders ab initio because of the decision in AF (No3)?

60. Mitting J dealt with this issue in **AN** in this way: -

> *"4…Mr. Owen QC* [counsel for the controlled person] *submits that I should quash the order. Mr. O'Connor [counsel for the Secretary of State for Home Department] submits that I should give directions for its revocation.*

> *Mr. Owen submits that the order was a nullity, because the Secretary of State had no power to make an order, which could not subsequently be sustained in proceedings which complied with the civil proceedings limb of Article 6. If I had been persuaded that the order was a nullity, I agree that it would have to be quashed, like the order which the Secretary of State had no power to make in Secretary of State for the Home Department v JJ [2007] UKHL 45 (because the Secretary of State had no power to deprive JJ of liberty). Article 6 applies to "control order proceedings": see Lord Bingham's summary of the Secretary of State's concession in MB at paragraph 15. Whether or not the procedure used has involved significant injustice to the controlled person must be determined by looking at the process as a whole: paragraph 35. The making of the order by the Secretary of State is part of that process. But it is the Court which determines, when granting or withholding permission to make the order under section 3(2) whether the decision of the Secretary of State is obviously flawed and which determines, on a review hearing under section 3(10), whether the decision to make the order and to continue it in force is flawed. The obligation to disclose or gist to the controlled person the essence of the case only arises at the stage when the Secretary of State's decisions are reviewed under section 3(10). Subject to the qualification made below, when the Secretary of State decides to apply for permission to make the order and makes it, he is not inhibited from relying on closed material which, in due course, he may elect to withdraw rather than to disclose or gist. Further, when the Secretary of State decided to make the order it was reasonable to suppose that she would be permitted to rely on the closed material without gisting or disclosing it: the hearing in MB did not begin until the following day and the decision was not handed down until 31st October 2007. If Mr. Owens's argument is right, it was not only the decision of the Secretary of State which was a nullity, but also that of Collins J, when he granted her permission to make the order on 3rd July 2007. On the principle that a decision of a properly constituted Court on an issue within its jurisdiction is binding unless and until set aside, that proposition is untenable. I am satisfied that both elements of the proceedings at the inception of the control order (Collins J's permission, and the minister's decision, to make the order) were lawful and that neither was a nullity. Taken together, that stage of the proceedings, cannot be so described. It follows that I am not required by the application of ordinary judicial review principles to quash the order".**

61. As I have explained, Mitting J did not have the benefit of the detailed and helpful submissions and citations, which I have had. Before setting out the citations from the authorities on which counsel for the controlees rely, I should explain that in order to determine if they will assist me, it is necessary to ascertain in the case of each citation first if there had been submissions from counsel in that case on whether the court should make a quashing order, rather than a prospective revocation order and second if it mattered in the case concerned whether the order was merely for prospective revocation or for quashing ab initio.

62. I am very conscious that in injunction proceedings, it rarely matters whether an order is quashed or revoked for two reasons. First, the party who has wrongly been

restrained can usually enforce the opposing party's undertaking as to damages and so to that successful party, it does not matter if the order is quashed or merely revoked prospectively. Second, even if the injunction is quashed, the party restrained can still be the subject of contempt proceedings for conduct which preceded the revocation of the court order, and so for that purpose, it does not matter if an injunction is revoked or quashed.

63. There are six factors, which individually and cumulatively lead me to the conclusion that the proper order is that all the relevant control orders against the controlees should be quashed. First, Baroness Hale in the **MB & AF** case specified that quashing was the proper course in these circumstances but before I quote her comments, I should explain why I have rejected the contention of Mr. Eicke that this statement had not been the subject of legal submissions because in that case, one of the issues was whether the special advocate procedure infringed article 6.

64. During the course of submissions in the **MB & AF case**, Mr Otty (who was then as now acting for AF) submitted that "*the Secretary of State's concern that the effect of quashing an order creates a lacuna in the protection of the public is misplaced*" (page 453 F). He contended the powers under section 2(12)(c) of the PTA for the court to direct the Secretary of State to revoke a control order or to modify its obligations was "*an insufficient response to a successful vires challenges to the order*" (page 453G) because such orders were "*legal nullities*". Mr. Otty also submitted that "*a failure to quash the order would be unlawful under section 6 (1) of [the HRA]"* (page 453h-454a). This was a very significant and relevant issue as the trial judge had quashed the control order (see [2007] EWHC 651 (Admin)).

65. Counsel for the Secretary of State in response then submitted in **MB** & **AF** case that if:-

> *"…there had been a deprivation of liberty within the meaning of article 5 the judge in AF's case was wrong to conclude that the appropriate remedy was to quash the control order since the effect of doing so was to render it of no effect and to leave the public , for whose protection it has been made, at risk of terrorist-related activity. The scheme of the 2005 Act is to focus specifically on individual obligations, rather than to treat a control order as either valid or invalid as a whole" (page 463h-464 a).*

66. In her speech, Baroness Hale dealt with this issue when she explained that the Secretary of State has to be given a choice as to whether or not to disclose material which the court considered ought to be disclosed under article 6 and if the election is that it should not be disclosed, it cannot be relied on by the Secretary of State. She continued by stating at page 491c-d (with my emphasis added) that:-

> "72….*But if the court considers that the material might be of assistance to the controlled person in relation to a matter under consideration it may direct that the matter be withdrawn from consideration by the court. In any other case, it may direct that*

> *the Secretary of State cannot rely upon the material. If the Secretary of State cannot rely on it, and it is indeed crucial to the decision, then the decision will be flawed and the order will have to be quashed.*"

67. It will be seen from the context in which that statement was made that I cannot accept the submission of the Secretary of State that this statement is of limited effect because the issue of the appropriate remedy had not been the subject of argument before the Appellate Committee although Baroness Hale's statement was obiter.

68. Second, it is noteworthy that Lord Bingham also said at page 483b in the same case that he "*can therefore see force in the argument that a declaration of incompatibility should be made and the orders quashed"* but ultimately he did not "*press my opinion to the point of dissent..*" ([44]). For the purpose of completeness, I should add that Lord Hoffmann said at page 484d at paragraph 50 "*if, on the evidence put before the judge on review, he considers that the decision of the Secretary of State was flawed, the order cannot stand*". I regard this statement as not determinative on the issue of whether he believed that quashing was the appropriate remedy as an order because the words "*cannot stand*" can be regarded as either referring to an order being quashed or being revoked. None of the other members of the Appellate Committee dealt with this point.

69. I consider that the statement of Baroness Hale supported as it was to a limited extent by the approach of Lord Bingham as being very persuasive authority in support of the contention that the appropriate remedy where there has been a serious breach of the article 6 rights of controlees is for there to be a quashing order. Third, a similar approach to that was advocated by Lord Hope (with whom Lord Scott agreed) in **AF (No. 3)** when he explained that if the controlee does not have the possibility to challenge the allegations against him *"the judge must exercise the power he is given by section 3(12) of the PTA 2005 and quash the control order"* [82]. The significance of section 3 (12) of the PTA (which I have set out in paragraph 14 above) is that it refers to powers first to quash and second to direct revocation and so Lord Hope considered that quashing and not revocation was the correct remedy but apart from Lord Scott none of the other members of the Appellate Committee commented on this. I should add that I only noted Lord Hope's comments after the end of oral submissions and so I do not know to what extent it was the subject of submissions.

70. A fourth and particularly important reason is that the controlees contend that support for the conclusion that the control orders are void comes from a landmark decision on natural justice in which Lord Reid in **Ridge v Baldwin** [1964] AC 40, 80 explained that:-

> *"Time and again in the cases I have cited it has been stated that a decision without regard to the principles of natural justice is void, and that was expressly decided in Wood v Wode. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision unless it is afforded to the person affected a proper opportunity to state his case."*

71. The statement that the decision would be "*void*" (which was supported by Lord Hodson at page 135 and Lord Morris at page 125) suggests that it would have no effect from the time when it was initially made. Lord Devlin and Lord Evershed disagreed as they believed that the breach of natural justice meant that the decision in question was voidable and not null and void ab initio (see page 142). An important issue in that case was whether the decision under challenge to dismiss the appellant which was in breach of natural justice because he was not given a proper opportunity to state his case was void or was voidable and the resolution of this issue determined one of the issues on the appeal which related to the obligation to give a pension to the dismissed constable (see page 70). I regard the statement of Lord Reid and the actual decision on that appeal as also being supportive of the conclusion that the control order should be quashed as opposed to being revoked prospectively especially as the control orders suffered from the vice of having been made without the controlees ever having been given in the words of Lord Reid "*a proper opportunity to state [their] case*" . I have already explained that the controlees did not know the closed case made against them as was explained in **AF (No. 3)** especially AF, who as I have already explained in paragraph 4(g) above, would not have known from the open evidence the Secretary of State's case against him.

72. A fifth reason why I consider that the original control orders should be quashed is that rights under the ECHR must be supported by sanctions and it is the duty of the court to provide sanctions as otherwise the rights will have no value. To my mind, it would not be just for a person like AF to have no remedy when first he has been subject to very comprehensive control orders for more than three years which undoubtedly seriously inhibited his ability to lead a normal life and second is now liable to be convicted of an offence of acting in breach of the control order in circumstances where his article 6 rights have been infringed because he has never been told details of the case against him.

73. I believe support for this can be found in the judicial attitude to article 13 of the ECHR, which provides that: -

> "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding the violation has been committed by persons acting in an official capacity*".

74. This article is not one of the Convention rights set out in Schedule 1 of the HRA and the reason which was given for its omission from the scheduled rights was that sections 7 to 9 of HRA were intended to lay down an appropriate remedial structure for giving effect to the Convention rights as defined by section 1(1) of the HRA. Nevertheless, article 13 cannot be ignored because in the words of Lord Brown in **R Al-Skeini & Others v Secretary of State for Defence** [2008] 1 AC 153, 219:-

> "*147 - … Article 13 does, however, impose upon the United Kingdom an international law obligation to afford "everyone whose rights and freedoms as set out in [the] Convention are violated… an effective remedy before a national authority*".

75. Similarly, Sedley LJ said in **R (K) v Camden and Islington Health Authority** [2002] QB 198 at paragraph 54 that:-

> "*While article 13 of the Convention is not among those scheduled to the [HRA], its requirement that there must be an effective remedy for violations of Convention rights reflects the long-standing principle of our law that where there is a right there should be a remedy. Parliament's intention was that the [HRA] itself should constitute the United Kingdom's compliance with article 13; but that makes it if anything more important that the courts, as part of the state, should satisfy themselves so far as possible that the common law affords adequate control, in conformity with article 13 of the legality of official measures which interfere with personal autonomy*".

76. This showed that it is no answer to the claim for a quashing order merely to assert that a prospective revocation would constitute an effective remedy for breach of article 6 rights as otherwise an individual who is confined to his home for example at least 14 hours a day for more than three years and subjected to the restrictions set out in paragraphs 3 to 6 above cannot on the basis of a flawed understanding of the law be said to have obtained an effective remedy merely because the confinement, which lasted for more than three years has eventually and very belatedly been brought to an end after a lengthy battle in the courts. In my view, article 6 provides the vital mechanism to protect Convention rights while article 13 and sections 7 to 9 of the HRA specify that there should be remedies for breaches of article 6.

77. Mr. Eicke contends that article 13 of the ECHR has been complied with in the present case because the automatic review mechanism in the PTA satisfied the requirements of article 13 in cases where there was, as in the present case, a threat to national security. He stressed that in **Al-Nashif v Bulgaria** (2003) 36 EHRR 37 [137], it was stated (with my emphasis added) that:-

> "*Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance. Furthermore, the question whether the impugned measure would interfere with the individual's right to respect for family life and, if so, whether a fair balance is struck between the public interest involved and the individual's rights must be examined".*

78. I am unable to accept Mr. Eicke's submission because there have been no "*adversarial proceedings*" in which AE and AF could participate as they did not know the case against them and so they could not give instructions to their legal advisers as was required by the decision in **AF (No.3).** In my view, there are only proper "*adversarial proceedings*" in cases where control orders are challenged if

disclosures of the kind stipulated in **AF (No.3)** had been given to the controlees but that has never occurred in the present cases. Mr. Eicke's submissions to the contrary fail to appreciate the importance of **AF (No.3)** in setting the threshold for the degree of disclosure, which is necessary where control orders are under challenge. In other words, proper "*adversarial proceedings*" can only exist if the article 6 rights of the individual concerned have not been infringed and the claimant knows the case against him in accordance with what was specified in **AF (No.3).**

79. A sixth reason why I consider that I have no discretion but to quash the control orders is that I am satisfied that if the Secretary of State had at any time during the life of any of the control orders been obliged to comply with the disclosure obligations in accordance with what was eventually decided in **AF (No. 3)** by disclosing to the controlees the essence of the case against them, he would have refused as he actually did after the House of Lords had reached its decision. I appreciate that Mr. Eicke contends that I cannot reach that conclusion, but as I have already explained in paragraph 43 above, it was for the Secretary of State (and not the controlees) to adduce some evidence to that effect as only he could explain why he would have or might have made that disclosure as the controlees would have had no knowledge on this issue. The Secretary of State has not done so and therefore I consider that the Secretary of State would not have made any control orders against the controlees if he had appreciated the nature and extent of the disclosure of closed evidence, which was required by **AF (No.3)**, namely "*knowledge of the essence of the case*" [65].

80. Each of those six factors whether considered individually or cumulatively supports my conclusion that the control orders should be quashed and I will return to consider from what date the quashing is to take effect in paragraph 87 and 88. None of these matters were put forward at the hearing before Mitting J nor was the fact that the cases of **AF(No3**) and **A v U.K** had retrospective and prospective effect as I explained in paragraphs 18 to 24 above. I have nevertheless read and re-read his judgment with growing admiration for a judgment delivered without the advantage I have had of written skeleton arguments and the citation of many authorities. I have however concluded that I am unable to agree with it because of the matters which were not put before him. The critical factor was that the authorities show that decisions are void and so should be quashed if they are made in breach of the rules of natural justice such as where one party does not know the case against him or her.

81. For the purpose of completeness, I should add that there are additional authorities, which were relied on by Mr Otty and Mr Owen where it is said that decisions are quashed but I do not regard these authorities as of much assistance as the court in each case was not considering whether the orders should be revoked or quashed. As I have explained in paragraph 62, in the case of injunctions it does not matter which term is used because the practical consequences are the same.

82. Those statements are found first in **Edwards v Environment Agency** [2008] 1 WLR 1587 when Lord Hoffmann said of cases where a decision in a judicial review case is found to be flawed that: "*it would not be a proper exercise of the discretion to refuse to quash it*". Similarly the word "*quashed*" was used by Lord Woolf CJ in **R (Roberts) v Parole Board** [2005] 2 AC 738 [83] (which was cited by Lord Carswell in the **MB & AF case** [83]) in which it was said that where a decision or a process involved substantial injustice "*the decision should be quashed*". In the **Roberts** case it did not matter if the order was revoked or quashed.

83. I have also considered, but not found of great assistance, the inference that Mr Otty invites me to draw from the wording of section 12(1) – (3) of the PTA, which provides that if anybody is convicted of an offence, which he could not have been convicted of if the control order had not been in force and the order is then quashed, an appeal from that conviction must be allowed. The whole basis of these provisions is that the control order had actually been "*quashed*" and the draftsman was using this word in contradistinction to the word "*revoked*".

84. In conclusion, the control orders should be quashed and not merely revoked and I will return in paragraphs 87-88 to consider with effect from what date the control orders should be quashed.

(ix) If there is only a discretion to quash the orders, what order should be made?

85. This issue only arises if my previous conclusions in the last sub-section are wrong and if the control orders are not quashed or revoked with retrospective effect. Mitting J dealt with the issue of discretion in this way in **AN** when he said that: -

> *"5. I accept that I have discretion whether to quash the order or to give directions for it to be revoked. The difference matters in this case, because AN has been charged with an offence of breaching the order. A decision by me to quash it would, without more, require the charge to be abandoned (this is the necessary consequence of the automatic quashing of any conviction provided for in section 12). Different orders have been made without full argument in R (ota Secretary of State) v Cerie Bullivant [2008] EWHC 337 (Admin) by Collins J and by me in BM. This is, as far as I know, the first occasion on which the issue has been fully argued. I am, therefore, free to determine it uninhibited by either of those two decisions. I am satisfied that I should not quash the order, but simply give directions for it to be revoked. I do so for the same reasons as those given briefly in BM. The order was properly made and renewed on the basis of material which the Secretary of State and Collins J were entitled to take into account. It was not a nullity. It is a control order which cannot now be sustained as a result of a proper decision made on or shortly before 15th July 2009 in the light of the law as it has now been declared to be by the House of Lords. In the exercise of the discretion which section 3(12) gives to me, I propose to give directions that an order, lawful at inception, but which can no longer be sustained, should be revoked"*

86. In the present case, I have had the benefit of much more detailed submissions than Mitting J had and I have concluded that if I had discretion to decide whether the control orders should be revoked or quashed, I would have concluded that I should exercise my discretion in favour of quashing the control orders essentially for six factors which individually and cumulatively drive me to this conclusion. These are the same six factors to which I referred in paragraphs 63 to 80 above when considering whether I was obliged to quash the control orders as well as the fact that if the control orders against AF are not quashed, the criminal proceedings against him

at the Central Criminal Court for breach of the control orders to which I referred in paragraph 4 (e) above would be or might well be continued. In the ordinary way, I would not wish to prevent a proper prosecution from being pursued but this prosecution is based on control orders made against him based *solely* on closed evidence on which he was unable to give instructions " *effectively to challenge the case that is brought against him"* (per Lord Hope in **AF (No. 3)** [85]). If the control orders against AF are not quashed, there is at least a strong possibility that the Crown Prosecution Service would pursue this prosecution. As I have explained in paragraph 83, if a control order is quashed after a controlee has been convicted for breach of the control order, an appeal from the conviction must be allowed. Similarly if the present control order against AF is quashed, but before the prosecution is completed, my provisional view without the benefit of submissions from the Crown Prosecution Service is that it might well be very difficult for the prosecution properly to be maintained. It would be very strange if a controllee's criminal liability would depend on whether the conviction comes before or after an order quashing the control order.

(*x) If the control orders have to be quashed, from what date have they to be quashed?*

87. The rival views of the parties are that the controlees contend that the orders should be quashed as from the date when they were made. The Secretary of State contends that if, contrary to his submissions, the control orders should be quashed and not revoked, then this must take effect from a much later date such as from the date of the CPR 76.29 proceedings.

88. My starting point is to ascertain what would have happened if the Secretary of State had appreciated when first considering whether to apply for control orders against AE and AF, the level of disclosure which was required of him to ensure that the article 6 rights of the controlees were preserved, namely the disclosure stipulated in **AF (No.3)** and **A v UK**, which is that "*the controlled person is given sufficient information to enable the special advocate effectively to challenge the case that is brought against him*" (per Lord Hope in **AF(No.3)** [85])**.** As I have explained in paragraph 43 above, I have assumed that in the absence of contrary evidence from the Secretary of State, he would not have been prepared to disclose the closed material. The decisions in **AF (No.3)** and **A v UK** show that he would then have had no case for obtaining a control order in the absence of the closed evidence especially in the case of AF in which there had been no disclosure in the open evidence as I explained in paragraph 4(g). In my view, the controlees should be put back in that position which means that no control orders would ever have been made and so the orders should be quashed as from the date on which they were made.

(xi) Conclusions

89. For the reasons, which I have sought to explain, I would quash the control orders ab initio.

V The Damages Claim Issue.

(i) Introduction

90. This issue relates to the question of whether the disclosure requirements identified in **AF (No. 3)** apply to a claim for damages by a controlled person against the Secretary

of State arising out of the imposition of a control order upon him. Mr Otty and Mr Owen contend that the principles set out in **AF (No. 3)** apply to any proceedings brought at common law under the HRA arising out of the imposition of control orders on the controlees. This would mean that in any such proceedings in the words of Lord Phillips in that case:-

> *"the controlee must be given any such information about the allegations against him to enable him to give effective instructions in relation to those allegations" [59]*.

91. Mr Eicke submits that the approach in **AF (No.3)** does not apply because the approach advocated in that case was concerned with and limited to the most serious type of restrictions on an individual and therefore it was not dealing with the use of closed material in claims for damages in respect of which different principles apply. He also contends that any relevant comments made by Lord Phillips on this issue were made without reference to the decision of the Court of Appeal in **Carnduff v Rock and Another** [2000] 1 WLR 1786 and the subsequent proceedings in that case in the Strasbourg Court.

92. The dispute is really whether the Secretary of State is correct in contending that **AF (No.3)** has no relevance in the damages claim and so that there is no irreducible amount of material that has to be disclosed to the controlees. It is difficult to anticipate how AF could succeed in a claim for damages against the Secretary of State if **AF (No.3)** did not apply because first as I have explained in paragraph 4(g), he has no knowledge of the material which afforded the Secretary of State reasonable grounds for suspecting him of involvement in terrorism-related activities and second the Secretary of State could rely on the closed evidence and on the closed judgments without him being able to give instructions in relation to it. AE would be similarly placed because although he was given some information in the open evidence, the consequence of the decision in **AF (No3)** was for the Secretary of State not to give any more information but instead to revoke the control orders.

93. So if Mr. Eicke is correct in his submissions on this issue, the Secretary of State could almost certainly defeat any claim by AF for damages arising out of the imposition of the control order first by filing closed Particulars of Defence, second by relying on the closed judgments and third by relying on the closed evidence notwithstanding that AF could not give any instructions or answer the allegations in the closed material even if there was a special advocate appointed. So AF would have no remedy arising out of the imposition and renewals of the control orders imposed on him for more than 3 years (save for the period in respect of which the Secretary of State has admitted liability subject to a limitation issue) other than having the order revoked at the end of a lengthy court battle. I am fortified in coming to that conclusion by the fact that when the hearing started, the second issue to be resolved before being amended was whether the Secretary of State "*was entitled to rely on the findings made by the Court after a procedure which has failed to comply with article 6 of the [ECHR]"*. The case for the Secretary of State was and has been that in any claim for damages brought by a controlee, he was entitled to rely on the closed evidence and the findings in those closed judgments, which in the light of the decision in **AF (No.3)** must now be regarded as infringing the controlees' article 6 rights.

94. On the other hand, if the submissions made on behalf of the controlees are correct, then the Secretary of State would have to work out a way to comply with the requirements in AF(No.3) in a way which meets his concerns perhaps by giving information to the controlees and their lawyers but on the basis that they give undertakings of secrecy and the hearings are then held in camera. If such a system cannot be devised, then it is likely that the Secretary of State might not be prepared to fight the claim for damages for the same reason as he would not give disclosure after the decision in **AF (No.3)** and then sought to revoke the control order. So if **AF (No.3)** applies to the claim for damages, the controlees might well be successful but that does not mean that they would therefore recover compensation because of the provisions of section 8 of the HRA. In any event, the damages payable might not be large because in **A v U.K.,** the Strasbourg Court had to consider what compensation was payable to individuals like the first and third applicants who had been detained from 19 December 2001 until 11 March 2005 and who together with their families had suffered mental illness and distress [236]- [237]. The Court took account of the fact that "*the detention scheme…was devised in good faith, as an attempt to reconcile the need to prevent the commission of acts of terrorism with the obligation under Article 3 of the Convention not to remove or deport any person to any country where he could face a real risk of ill-treatment"* [252]. This factor led to a reduction of the compensation payable to 3,900 Euros for each applicant[253]. A similar approach might be adopted in this case if the controllees were successful.

(ii) The decision in AF (No. 3)

95. This proper approach to article 6 was considered by Lord Phillips in his speech in **AF (No. 3)** with which other members of the Appellate Committee agreed when he explained in relation to article 6 that "*57. The requirements of a fair trial depend, to some extent, on what is at stake in the trial*". This of course requires consideration of the position of the controlees and it is a fact-sensitive exercise because the court is being required to balance two conflicting claims. On one side, there is the State wishing to control terrorism and therefore not be willing to explain how and with whose assistance, it seeks to counter terrorism and obtain evidence while the opposing interest is that of the controlees who wish to have an effective remedy for the breach of their rights which led to the imposition and renewal of the control orders with the consequences which I have described in paragraphs 3 to 6 above. In carrying out the necessary balancing exercise, the nature and length of the restrictions imposed on the particular controlees would probably be relevant. I have concluded that I can only really consider this exercise in the light of the nature and extent of the actual facts relating to AE and AF and so any declaration, which I make, will relate to them and to them alone.

96. Lord Phillips continued in his speech in **AF (No. 3)** by stating in relation to the decision of the Strasbourg Court in **A v UK** (supra) that: -

> "*57.. The Grand Chamber was dealing with the applicants complaining of detention contrary to article 5(1). The relevant standard of fairness required of their trial was appropriate to article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that article 5(4) imported the same fair trial rights as article 6 (1) in its criminal aspect- see para 217.Mr Eadie submitted that a*

> *less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were made subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order falls short of detention. But I do not consider that the Strasbourg court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial. Where this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases*".

97. In response, Mr Eicke points out correctly that these comments with which the other members of the Appellate Committee agreed were made *obiter* but they nevertheless were made with the benefit of submissions from the Secretary of State as appears from the passage, which I have just quoted. I do not accept for four inter-connected reasons Mr Eicke's contentions that it would not be appropriate to apply the approach in **AF (No.3)** that a controlee in the position of AE or AF ought to be told the essence of the case against him when pursuing a claim for damages.

98. First, as I have already stated, Lord Phillips explained that "*the requirements of a fair trial depend, to some extent on what is at stake in the trial*". Significantly what is at stake in the proceedings with which this issue is concerned are the attempts of the controlees to obtain a remedy for a serious wrong which was the imposition and renewal of very comprehensive control orders for a period of more than three years with substantial restrictions on their ability to lead a normal life in breach of their article 6 rights. In my view, it seems that unless **AF (No.3)** applies so that the controlees know the case against them (whether as a result of ordinary disclosure or a consequence of being told subject to undertakings by the controlees and their solicitors to keep the information secret and then having secret hearings) they will almost certainly either lose their rights to clear their names and in appropriate cases to obtain compensation or at least they will have very great difficulties in enforcing those rights.

99. It is noteworthy that as I explained in paragraph 4(g) in AF's case, there was no open information that had been disclosed to him in the control order proceedings to justify the imposition of a control order and this increases the likelihood that the order would have been confirmed in a closed judgment because the controlee could not give proper instructions to his legal advisers. Then if Mr. Eicke is correct, AF would not only have not known the case against him in the control order proceedings but also in his claim for damages he could not explain why the control order should not have been made and his claim for damages would probably fail. In other words, if the Secretary of State's stance is correct, a controlee would be left without any remedy.

100. Second, as Sedley LJ explained in the **Camden** case to which I referred in paragraph 75, "*it is a requirement that there must be an effective remedy for violations of Convention rights reflects the long-standing principle of our law that where there is a right there should be a remedy*".

101. As I have explained, if any claim of the controlees arising out of the imposition and renewal of the control orders was outside the ambit of **AF (No.3)**, then the controlees would have no remedy so that the Secretary of State would have in fact been granted

an immunity against civil claims. I do not consider this to be correct especially as in the claims by the controlees for damages, they would also be seeking to clear their names, which is significant as the stigma of having been subject to a control order cannot be exaggerated because the existence of such an order shows that the Secretary of State had reasonable grounds for suspicion of the controlee's involvement in terrorism-related activity and against whom the Secretary of State considers it necessary for purposes connected with protecting members of the public from a risk of terrorism to impose a control order (section 2 (1) of the PTA). I am unable to agree with Mr. Eicke's suggestion that the position of the controlees would be so *fundamentally* different when making claims for damages than when contesting the control orders because they are no longer subject to those orders. This argument fails to give adequate weight to the importance of AF's claim for damages as first a means of giving him a remedy for the breaches of article 6 in the earlier proceedings, second permitting him to clear his name and third ensuring that those (like the controlees in the present case) whose rights under the ECHR are infringed are not deprived of a remedy.

102. Third, Lord Phillips in **AF (No. 3)** was dealing with a matter of principle in general terms and there is nothing in his co;mments which suggests that they did not apply to claims by controlees seeking to obtain redress for a breach of their article 6 rights. Fourth, the principle of equality of arms is applicable to disputes between individuals and the state and this must mean that a party cannot be doomed to lose his case because he does not know the case against him and so cannot give instructions to the special advocate acting for him. So subject to the decision in **Carnduff**, my provisional view is that the principles set out in **AF (No. 3)** apply to claims for damages by AE and AF.

(*iii) The decision in* ***Carnduff v Rock and Another*** *[2000] 1 WLR 1786.*

103. Mr Eicke then contends that the approach of Lord Phillips was made without reference to the judgment of the Court of Appeal in **Carnduff v Rock and Another** which concerned a claim brought by a registered police informer against a Police Inspector and a Chief Constable to recover payment for information and assistance provided to the police. The defendants denied any contractual liability to make any payments and they applied to strike out the claim on the grounds that it disclosed no reasonable cause of action.

104. A majority of the Court of Appeal held first that a fair trial on the issues arising from the pleadings would necessarily require the police to disclose and the court to investigate sensitive information which should in the public interest remain confidential to the public and second that the public interest in withholding the evidence of such issues outweighed the counter veiling public interest in having the claim litigated on the available relevant evidence. I stress that the decision in that case was the result of a balancing exercise. The majority of the Court of Appeal therefore struck out the claim. It is noteworthy that Laws LJ (who with Jonathan Parker LJ formed the majority) said that: -

> "*33. It seems to me that these matters cannot be litigated consistently with the public interest; and that if that is so there is plain justification to strike out the claim as embarrassing or abusive, under CPR r3.4. See what is involved. If the disputes*

which they generate were to be resolved fairly by reference to the relevant evidence – and there is no other legitimate judicial means of proceeding – the court would be required to examine in detail the operational methods of the police as they related to the particular investigation in question".

105. Subsequently the European Court of Human Rights in **Carnduff v United Kingdom** (App No. 18905/02-10 February 2004) held Mr Carnduff's complaint under article 6 to be inadmissible as manifestly unfounded because "*the decision of the Court of Appeal was proportionate and within the margin of appreciation afforded to Contracting States to regulate the right of access to court*" (pages 13-14).

106. In its admissibility decision, in **Carnduff,** the Strasbourg Court also noted with approval the observation of Laws LJ that "*if he had been of the view that there was a sensible possibility that the action could be tried without offence of the public interest*", he would not have struck out the case but would have left the court to ascertain "*through usual interlocutory procedures whether there was machinery available to enable the issues to be tried fairly*" (page 13). Mr Eicke says that the reference by Laws LJ and the Strasbourg Court to fairness was a reference to fairness to both parties to the dispute. I ought to add that the **Carnduff** decision preceded the introduction and the use of special advocates in civil proceedings which started with the comments of Lord Woolf MR in **Secretary of State for Home Department v Rehman** [2003] 1AC 153, 164H and which have been frequently used thereafter in appropriate cases as I sought to explain in **Al Rawi and others v The Security Service** [2009] EWHC 2959(QB) [16] - [52]. In my opinion, it is likely that if a court now had to deal with the facts in **Carnduff**, a special advocate might be appointed with the consequence that the result of the hearing might now be different. In addition as I have already explined, it might be possible for the Secretary of State to provide the requisite information to the controlees and their lawyers on the basis that they give undertakings to respect its confidentiality and that the hearings are then heard in secret.

107. Thus the case for the Secretary of State is that it is for the Court in the circumstances of each case to consider whether there are mechanisms available to ensure the issues raised in the controlees' counter claim can be tried fairly. What Mr Eicke says is if that is not possible, the decision of the Court of Appeal in **Carnduff** would require a claim by the controlees for damages to be struck out and the proceedings discontinued.

108. It is true that the decision in **Carnduff** was apparently not referred to in argument or in the written or oral submissions in **AF (No.3)** but I do not accept that it would have the effect advocated by Mr Eicke or any effect on the decision of the Appellate Committee for two reasons. First, as I have already explained, Lord Phillips stressed that "*the requirements of a fair trial depend, to some extent, on what is at stake*" (para 57). Indeed as I have explained in paragraph 104, the actual decision in Carnduff was a result of a similar balancing exercise. There is a substantial difference between what was at stake in **Carnduff** and what would be at stake for, for example, AF. Mr. Carnduff was bringing a claim to recover an alleged debt in his role as a registered police informer while AF and AE (unlike Mr. Carnduff) were seeking damages in respect of infringement of very important rights embodied in the ECHR for more than three years and the opportunity to clear their name. In my view, the courts should be

reluctant to permit a claim on Carnduff lines by the State to trump a claim by a victim of serious breaches of his rights under the ECHR who is seeking to obtain a remedy for those infringements The claims of Mr. Carnduff and those of the controlees are very different and at rather different ends of the spectrum and so the Secretary of State cannot derive much assistance from the decision in the **Carnduff** case.

109. Second, the decision of **Carnduff** has now to be reconsidered in the light of the decision of the Grand Chamber in **A v UK** (supra). Section 2 of the HRA states that a judge in this country "*must take into account*" any judgment of the Strasbourg Court. Furthermore as Lord Bingham explained in **R (Anderson) v Secretary of State** [2003] 1 AC 837, 879-880 [18], the House of Lords "*will not without good reason depart from the principles laid down in a carefully considered judgment of the Grand Chamber*". No good reason has been put forward as to why the approach to article 6 in **A v UK** should not be determinative.

110. In other words, the decision and approach of the Grand Chamber in **A v UK** and its application in **AF (No.3)** must represent the law of this country even if it is inconsistent with the decision in **Carnduff**. Indeed as Lord Rodger said in **AF (No. 3)**, "*Strasbourg has spoken, the case is closed"* [98].

111. There are other reasons why the reasoning in **AF (No.3)** might apply to claims brought by the controlees so as to prevent the Secretary of State being able to rely on the closed material apart from the statements made by Lord Phillips to which I referred in paragraph 95 above. First, there is other judicial support for the view that the approach of Lord Phillips in **AF (No.3)** applies not merely in cases where there are very severe restrictions on the controlee but also in cases where the restrictions "*are said to be light or not severe*" (per Collins J in **R (Secretary of State) v BC and BB** [2009] EWHC 2927 (Admin) [57]. A similar approach appears to have been taken by Mitting J in **BM v Secretary of State** [2009] EWHC (Admin) 1572 [12] and [13]. Finally, the Employment Tribunal in **Tariq v The Home Office** (UKEAT/0168/09) held that the decision in **AF (No.3)** should apply to a hearing in the Employment Tribunal for a claim of discrimination. I understand that appeals from the decisions in **BC** and **Tariq** are shortly to be heard by the Court of Appeal and I do not derive much assistance from them.

112. For all those reasons I have come to the conclusion that in any claim brought by the controlees against the Secretary of State, the principle of **AF** (**No.3)** applies and the previous law that there is no irreducible minimum of evidence which should be disclosed to a controlee should no longer apply to their claims. If this were not so, the controlees would be deprived of any remedy for breach of their rights.

VI The Costs Issue

113. The House of Lords ordered that the Secretary of State should pay the costs of the controlees for the proceedings in the Court of Appeal and in the House of Lords but there still remains outstanding the costs of the lengthy previous proceedings in these cases before the Administrative Court, which have not been the subject of costs orders in favour of either party.

114. The Secretary of State accepts correctly in my view that if this court quashes a control order, then the controlees are entitled to recover their costs from the Secretary of State

by application of the normal rules. For the reasons which I have explained, in this case the control orders have to be quashed and so the controlees are entitled to their costs from the date when they were quashed

115. In case I am wrong about that, I must deal with Mr Eicke's further submission that where the court does not quash a control order but merely directs its revocation, there should be no order as to costs. The basis of that submission is that the court is in those circumstances unable to determine whether the necessary reasonable grounds for suspicion existed when the order was made or at any times thereafter.

116. That means that the court is required to find that the control orders were flawed solely on the basis that there is now which is some time after the time when the control orders were revoked insufficient evidence to establish such reasonable grounds for suspicion. In those circumstances, it is said by Mr. Eicke that the only appropriate order is no order for costs. I am prepared to assume that Mr. Eicke was correct when contending that the proper approach is that advocated by Mitting J in **R (Secretary of State for the Home Department) v E** [2009] EWHC 597 (Admin) when he said that in such cases: -

> *"17... the appropriate test in my judgment, is whether it is more likely than not that the decision to make or maintain the control order or to impose or maintain in place an individual obligation would have been held to have been flawed and so have been quashed"*.

117. To fortify this point, Mr Eicke points out that the underlying reason for the Secretary of State's inability to provide the court with the necessary evidence is the need to protect the public interest from injury which both the special advocates and the court have repeatedly accepted would inevitably occur if the evidence were disclosed. It is also stressed that the Secretary of State's original decision was lawfully made by reference to such evidence following the grant of permission to make such an order by this court after it had considered the totality of the evidence including the closed evidence.

118. In my view, the reason why the control orders have been revoked has been the decision of the Secretary of State not to disclose further material because he could not comply with the requirements of article 6 of the ECHR. Indeed if the Secretary of State had not revoked the control orders on the controlees, the position would in my view have been that the Secretary of State would have refused to give disclosure to the controlees in accordance with the approach specified in **AF (No. 3)**. Without that evidence, the Secretary of State would have had no case for imposing or renewing control orders, which would then have been quashed. I have come to the clear conclusion that the controlees would have been the successful parties and the Secretary of State would have been the unsuccessful party as he would have failed to have the control orders upheld. In those circumstances, I have concluded that the Secretary of State should pay the costs outstanding of the controlees on a standard basis.

VII Conclusions

119. Although the controlees have been successful on all issues, they must appreciate that this means neither that they will therefore automatically succeed on liability on all claims against the Secretary of State nor that even if they did, that they would recover any damages against him especially in the light of the provisions of section 8 of the HRA. I have explained in paragraph 94 above the low level of compensation payable.

120. I answer the questions posed to me as follows with my answers in italics:

A. Whether in circumstances where the requirements of Article 6 of the European Convention compel the Secretary of State to withdraw the material relied upon in support of a control order such that the order cannot be maintained the Court should:

i. Quash the control order (and any relevant renewals) *ab initio* or direct revocation with retrospective effect; or

ii. Direct the revocation of the control order with prospective effect only (to the extent that this has not occurred)

The answer is that on the facts of the present cases, the control orders made against AE and AF should be quashed ab initio.

B. Whether the disclosure requirements identified in **AF (No. 3)** apply to a claim for damages by a controlled person arising out of the imposition of a control order upon him

The answer is that those requirements apply in principle to claims for damages by AE and AF arising out of the imposition of a control order upon them.

C. Whether a Respondent to control order proceedings is entitled to recover the costs of those proceedings where the control order is quashed or revoked (either prospectively or retrospectively) as a result of the Secretary of State's election not to disclose further material so as to comply with the requirements of Article 6 of the Convention

The answer is that AE and AF are entitled to recover their costs (which have not been the subject of previous orders) on a standard basis against the Secretary of State for Home Department.