Neutral Citation Number: [2008] EWCA Civ 1148

Case No: T1/2008/0858, 9501, 9502, & 9503

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Stanley Burnton (AF)
The Hon Mr Justice Sullivan (AM)
The Hon Mr Justice Mitting (AN)
The Hon Mr Justice Silber (AE)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17th October 2008

Before :
SIR ANTHONY CLARKE MR
LORD JUSTICE WALLER V-P
and
LORD JUSTICE SEDLEY

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
AF, AM and AN	**Respondents**
and between	
AE	**Appellant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
and with	
JUSTICE	**Intervening**

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- -

Philip Sales QC, Nicholas Moss, Cecilia Ivimy, Andrew O'Connor and **Kate Grange** (instructed by the **Treasury Solicitor**) for the **Secretary of State for the Home Department**
David Pannick QC, Timothy Otty QC, Zubair Ahmad and **Tom Hickman** (instructed by **Middleweeks**) for **AF**
Timothy Otty QC and **Kate Markus (**instructed by **Messrs Arani & Co** for **AM**
Tim Owen QC and **Frances Webber** (instructed by **Messrs Birnberg Peirce**) for **AN**
Owen Davies QC and **Ali Nanseen Bajwa** (instructed by **Messrs Chambers Solicitors**) for **AE**
Hugo Keith and **Jeremy Johnson**, special advocates for **AF**

Mohammed Khamisa QC and **Shaheen Rahman** special advocates for **AM**
Andrew Nicol QC and **Paul Bowen** special advocates for **AN**
Michael Supperstone QC and **Tom de la Mare**, special advocates for **AE**
Michael Fordham QC, **Shaheed Fatima** and **Tom Richards** for **JUSTICE**, intervening and providing written submissions

Hearing dates: 14, 15, 16, 21, 22 and 23 July 2008

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Judgment

Sir Anthony Clarke MR and Waller LJ, V-P:

Introduction

1. AE, AF, AM and AN are all the subject of non-derogating control orders. The Secretary of State for the Home Department ('the SSHD') is the appellant in the cases of AF, AM and AN, while AE is the appellant in the other appeal. The principal issue in all these appeals is what principles govern the question whether, in the light of the decision of the House of Lords in *SSHD v MB and AF* [2007] UKHL 46, [2008] AC 1 AC 440, the controlee has had a fair hearing compatible with article 6 of the European Convention on Human Rights ('the Convention') of the issue whether there are reasonable grounds for suspecting that he is or has been involved in terrorism-related activity.

2. Each of the appeals is an appeal from a different judge. AE appeals from a decision of Silber J in which he held that AE had had a fair hearing. The SSHD appeals from decisions of Stanley Burnton J in AF, Sullivan J in AM and Mitting J in AN. All those decisions were in favour of the controlee. The judge at first instance gave permission to appeal in all the cases.

3. The argument ranged far and wide. We will consider first, so far as necessary, the statutory framework, secondly the general principles deriving from the decision of the House of Lords in *MB and AF*, thirdly the application of those principles in each case and finally a number of particular issues which are specific to particular appeals.

The statutory framework

4. The control order regime has now been the subject of a number of decisions and is comparatively well-known. The critical provisions of both the Prevention of Terrorism Act 2005 ('the PTA 2005') and CPR Part 76 are set out in the speech of Lord Bingham in *MB and AF* at [13-14] and [23-24].

5. As he explained in [13], the conditions for making and upholding a non-derogating control order under sections 2(1)(a) and 3(10) of the PTA 2005 are that the Secretary of State

> "(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
>
> (b) considers it necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

It is not now in dispute that the critical issue under section 3(10) of the PTA 2005 is whether there are reasonable grounds for suspicion that the controlee is or was involved in terrorism-related activity: see *MB* in this court (in a part of the judgment not disapproved in the House of Lords) at [58] *et seq*.

6. Lord Bingham succinctly summarised the provisions relating to special advocates and the relevant provisions of CPR Part 76 at [25-26] as follows:

"26. The Schedule to the 2005 Act provides a rule-making power applicable to both derogating and non-derogating control orders. It requires the rule-making authority (para 2(b)) to have regard in particular to the need to ensure that disclosures of information are not made where they would be contrary to the public interest. Rules so made (para 4(2)(b)) may make provision enabling the relevant court to conduct proceedings in the absence of any person, including a relevant party to the proceedings and his legal representative. Provision may be made for the appointment of a person to represent a relevant party (paras 4(2)(c) and 7). The Secretary of State must be required to disclose all relevant material (para 4(3)(a)), but may apply to the court for permission not to do so (para 4(3)(b)). Such application must be heard in the absence of every relevant person and his legal representative (para 4(3)(c)) and the court must give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest (para 4(3)(d)). The court must consider requiring the Secretary of State to provide the relevant party and his legal representative with a summary of the material withheld (para 4(3)(e)), but the court must ensure that such summary does not contain information or other material the disclosure of which would be contrary to the public interest (para 4(3)(f)). If the Secretary of State elects not to disclose or summarise material which he is required to disclose or summarise, the court may give directions withdrawing from its consideration the matter to which the material is relevant or otherwise ensure that the material is not relied on (para 4(4)).

27. Part 76 of the Civil Procedure Rules gives effect to the procedural scheme authorised by the Schedule to the 2005 Act. Rule 76.2 modifies the overriding objective of the Rules so as to require a court to ensure that information is not disclosed contrary to the public interest. Rule 76.1(4) stipulates that disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the UK, the detection or prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. Part III of the Rule applies to non-derogating control orders. It is unnecessary to rehearse its detailed terms. Provision is made for the exclusion of a relevant person and his legal representative from a hearing to secure that information is not disclosed contrary to the public interest (rule 76.22). Provision is made for the appointment of a

> special advocate whose function is to represent the interests of a relevant party (rules 76.23, 76.24), but who may only communicate with the relevant party before closed material is served upon him, save with permission of the court (rules 76.25, 76.28(2)). The ordinary rules governing evidence and inspection of documents are not to apply (rule 76.26): evidence may be given orally or in writing, and in documentary or any other form; it may receive evidence which would not be admissible in a court of law; it is provided that "Every party shall be entitled to adduce evidence and to cross-examine witnesses during any part of a hearing from which he and his legal representative are not excluded".

7. It was argued in *MB and AF* that those provisions were in part incompatible with the Human Rights Act 1998 ('the HRA') in so far as they infringed the controlee's right to a fair trial of his civil rights and obligations under article 6 of the Convention and a declaration of incompatibility was sought on that ground. Lord Bingham was inclined to grant such a declaration but deferred to the view of the majority, comprising Baroness Hale, Lord Carswell and Lord Brown, that the relevant provisions should be read down under section 3 of the HRA, so that they would take effect only when it was consistent with fairness for them to do so: see per Lord Bingham at [44]. Baroness Hale explained the reasons why the reading down solution was appropriate at [70-73]. See also per Lord Carswell at [84] and Lord Brown at [92].

The decision of the House of Lords in *MB and AF*

8. In *MB* this court, comprising Lord Phillips CJ, Sir Igor Judge P and myself, held that, once it was held that reliance on closed material was permissible, those provisions of the PTA 2005 and of CPR Part 76 which provide for the use of special advocates constituted appropriate safeguards for the controlee. In *MB and AF* Lord Hoffmann agreed with that view but the majority of the appellate committee did not. The majority concluded that all depended upon the circumstances. In referring to the majority in this judgment we refer to Baroness Hale, Lord Carswell and Lord Brown. Although (as just stated) Lord Bingham did not dissent in the result, his reasoning seems to us to have been in some respects different from that of the majority. The issue which arises in this appeal is in what circumstances, as a matter of principle, a controlee will be regarded as having a fair hearing of the case against him and in what circumstances he will not.

9. It is convenient to consider this question by reference to the facts of AF. They are briefly these. In all, four control orders have been imposed on AF. The first, PTA/6/2006, which was imposed on 24 May 2006, confined him to his flat for 18 hours a day. On 11 September 2006 the SSHD revoked that order in the light of the decision of this court in *SSHD v JJ* [2006] EWCA Civ 1141, [2007] QB 446, which had upheld the decision of Sullivan J quashing the order in *JJ* on the ground that it amounted to a deprivation of liberty and could not therefore be made as a non-derogating control order. On the same day the SSHD imposed a second control order on AF, PTA/33/2006, which was subsequently modified on 18 October 2006. By that order AF was confined to his flat for 14 hours a day. He was also subject to other restrictions.

10. The question whether the second control order amounted to a deprivation of liberty was considered in detail by Ouseley J at a trial which lasted seven days in February 2007. On 29 March 2007, in anticipation of his judgment being adverse, the SSHD made a third control order against AF, PTA/4/2007. On 30 March the second order, PTA/33/2006, was indeed quashed by Ouseley J as a deprivation of liberty in a very detailed judgment at [2007] EWCA 651 (Admin). The third order was served on AF on the same day. On 17 August that order was modified by Goldring J. The order of Ouseley J was subject to a leap frog appeal to the House of Lords, where it was heard with *MB* and *JJ* [2007] UKHL 45, [2008] 1 AC 385, together with *SSHD v E*, [2007] UKHL 47, [2008] 1 AC 499. The House of Lords gave judgment in all the appeals on 31 October 2007. It allowed the SSHD's appeal against AF on the deprivation of liberty point. As a result further modifications were made by the SSHD to PTA/4/2007 on 31 October and 9 November 2007.

11. The House of Lords remitted both *MB* and *AF* to the High Court for further consideration in the light of the opinions of the appellate committee. There followed a diversion before Stanley Burnton J and this court which is not relevant to any of the issues in this appeal except standard of proof: see [2007] EWHC 2828 (Admin) and [2008] EWCA Civ 117 respectively. There then followed two further hearings before Stanley Burnton J in which he had before him the proceedings under section 3(10) of the PTA 2005 which had been remitted by the House of Lords. The first hearing, which occurred on 5 and 25 February 2008, culminated in a judgment handed down on 10 March 2008, namely [2008] EWHC 689 (Admin). In it Stanley Burnton J considered whether the proceedings before Ouseley J relating to PTA/33/2006 complied with article 6 of the Convention. It had been submitted to him that they did not on the ground that none of the significant allegations and none of the significant evidence relied upon by the SSHD has been disclosed to AF. He held that they did not, subject to hearing argument on the question whether what has been described as the 'Lord Brown exception' (to which we return in detail below) represents the law and, if it does, whether the case of *AF* fell within it on the facts. There was a further hearing on those questions on 12 March and, in a judgment handed down on 9 April 2008, [2008] EWHC 689 (Admin), he held that the Lord Brown exception does not represent the law but that if, contrary to that view, it does, it was satisfied on the facts, albeit on what he described in his open judgment as a very narrow basis. His reasons are given in his closed judgment of 9 April 2008. Stanley Burnton J also held that the reasoning referable to PTA/33/2006 applied also to PTA/04/2007. In the result he refused the SSHD's application for permission to withhold closed material from AF in both cases All his conclusions are subject to appeal by one side or the other.

12. In the House of Lords there was much discussion of Ouseley J's judgment in *AF* because, although he quashed the order, PTA/33/2006, on the ground that it amounted to a deprivation of liberty, he nevertheless considered whether AF had a fair hearing of the critical issue.

13. In his judgment at [11] Ouseley J described the case against AF in the open material as very short. As appears from [131] and [146], it was not contended before him that the open material, ie that disclosed to AF, provided reasonable grounds for suspicion. At [147] Ouseley J recorded the submission of Mr Otty QC for AF that for a hearing to be fair, even with the assistance of special advocates, an irreducible core of the case against him had to be disclosed. That was said initially to be all the core allegations

in the case but later it was said to be just those allegations sufficient for the order to be maintained. Mr Otty's submission was that it was the allegations that mattered and not the evidence which lay behind them. As appears below, this was in effect Mr Pannick QC's submission before us, although the principle was put more broadly on behalf of other controlees.

14. Ouseley J rejected the submission that the decision of this court in *MB* could be distinguished: see [155]. He nevertheless considered the question of fairness for himself in some detail: see [167]. He considered at some length the decision of the House of Lords in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, noting the differing views expressed by their lordships at [156] to [166]. He noted at [165] what he described as the real question:

> "165. The real question in my view is suggested by Lord Rodger in paragraph 111 of *Roberts*: does the procedure meet the minimum standards of fairness for a hearing of this particular kind in circumstances where the use of the non-disclosed material (by the decision maker or court) was necessary and proportionate? Whether non-disclosure of material is necessary and proportionate will usually involve a balance being struck either in legislation or in the hearing process, between the rights of an individual and the reduction of risk to a serious public interest in order to protect the rights of others."

15. Ouseley J then set out his own conclusions at [166] to [167]:

> "166. There is nothing in *Roberts* which requires me to conclude that the process laid down by the Act and the Rules is incompatible with Article 6 as a result of the negligible disclosure of the case against him which AF has received. Nor do the comments relied on form a clear statement of principle supporting what Mr Otty submitted. On the contrary, there is nothing in *Chahal* to suggest that there is a point at which the suggested special advocate procedure for legitimately withheld material, becomes unfair. There is no clear basis for a holding of incompatibility.
>
> 167. I have taken time with this argument notwithstanding *MB*, because it is directed at the Court's own functions and duties, and indeed at what could have been a decision of mine to uphold the Order on a basis which was said to be wholly unfair. I should add that looking at the nature of the issue, namely necessary restrictions on movement in an important interest, and at the way in which the Special Advocates were able to and did deal with the issues on the closed material, I do not regard the process as one in which AF has been

> without a substantial and sufficient measure of procedural protection."

16. The significance of the reference to "a substantial and sufficient measure of procedural protection" is that that phrase derives from the important decision of the European Court of Human Rights ('ECtHR') in *Chahal v United Kingdom* (1996) 23 EHRR 413 at [131], to which we return below. Ouseley J then considered the decision of the Canadian Supreme Court in *Charkaoui v Minister of Citizenship and Immigration* [2007] SCC 9. He said at [173] that one of the issues considered by the Canadian Supreme Court was whether the restrictions in the control order (or its equivalent) were justifiable. He added:

> "173. … As in *Chahal*, the Canadian Supreme Court held that the restrictions were not justifiable because they went further than was necessary. As in *Chahal*, some form of special advocate system was commended. In neither case was there any suggestion of an irreducible core of allegation or evidence that had to be made available with such a special advocate system in place. And both those cases involved detention rather than restriction on movement."

17. It is clear from his [166] that Ouseley J regarded the special advocate procedure as providing a fair procedure. It is also clear that he considered the question of fairness in addition to, and quite apart from, *MB* and concluded that in all the circumstances (including the role of the special advocates on the one hand and the fact that AF had not been informed of the case against him on the other) AF had not been deprived of a substantial and sufficient measure of procedural protection. It is of particular note that, as Ouseley J put it, in neither *Chahal* nor *Charkaoui* was there any suggestion of the necessity for the open disclosure of an irreducible core of allegation or evidence once a special advocate system was in place. These considerations are in our view important in trying to identify what principles the majority of the House of Lords approved in *MB and AF*.

18. It is important to note that in this appeal we are concerned, not to decide what in our opinion the relevant principles should be (absent authority), but only what they are after the decision of the House of Lords. Two points emerge with absolute clarity from it. The first is that it is wrong to say that a hearing of the critical issue will always be fair in a case where some or all of the allegations and evidence are not disclosed to the controlee provided that a special advocate is appointed. That follows from the rejection of the decision of this court in *MB* and from the fact that no other member of the appellate committee agreed with Lord Hoffmann. The second point is that it cannot be held that a hearing will never be fair unless all the substantial allegations and evidence relating to them are disclosed. While Lord Bingham was we think inclined to that view (or something close to it), it was rejected by the majority.

19. All thus depends upon the circumstances. The tricky part is to try to divine what circumstances will lead to what result. It is common ground that the ordinary principles applicable to an ordinary civil dispute do not apply. In an ordinary civil action, it is common ground that (as in a criminal prosecution) a party is entitled to know the detail of the case against him and to know, see and hear the evidence against him so that he may prepare a response and adduce evidence of his own, which must in

turn be made available to his opponent. Those rights are often expressed in ringing tones: see eg *MB and AF* per Lord Bingham at [28] to [31] and *Roberts* per Lord Bingham at [17].

20. It is, however, accepted that those rights are not absolute. Baroness Hale gave some examples from our own jurisprudence at [58] and [59]. As to the Strasbourg jurisprudence, Lord Bingham observed at [32] that the ECtHR has repeatedly stated that the rights embodied in article 6 of the Convention are not absolute: see in a criminal context *Jasper v United Kingdom* (2000) 30 EHRR 441 at [52] and *Fitt v United Kingdom* (2000) 30 EHRR 480 at [45]. However, Lord Bingham emphasised at [33] that the real problem lies, not in cases like *Jasper* and *Fitt*, where the material not disclosed was not relied upon against the defendant, but in cases in which it is. He said at the end of [33]:

> "The real problem arises where material is relied on in coming to a decision which the person at risk of an adverse ruling has had no adequate opportunity to challenge or rebut, as in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, paras 42, 44; *Van Mechelen v The Netherlands*, [(1977) 25 EHRR 647], paras 62-65; *Luca v Italy* (2001) 36 EHRR 807, paras 43-45. In each of these cases the trial was found to be unfair."

Of those cases, *Van Mechelen* and *Luca* were criminal cases. *Feldbrugge* was a civil case but it was not a case which was concerned in any way with national security. As we see it, it was simply a case in which the ordinary civil principle was applied.

21. As Lord Bingham observed at [32], the ECtHR has recognised the particular problems posed to national security by terrorism. He said this:

> "The court has not been insensitive to the special problems posed to national security by terrorism: see, for instance, *Murray v United Kingdom* (1994) 19 EHRR 193, paras 47, 58. It has (as it was said in *Brown v Stott*, [[2003] 1 AC 681, 719] above, p 704) eschewed the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances, and has recognised the need for a fair balance between the general interest of the community and the rights of the individual. But even in cases where article 6(1) has not been in issue, the court has required that the subject of a potentially adverse decision enjoy a substantial measure or degree of procedural justice: see *Chahal v United Kingdom* …, para 131; *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, para 97. In *Tinnelly & Sons Ltd and McElduff & Others v United Kingdom* (1998) 27 EHRR 249, para 72, the court held that any limitation of the individual's implied right of access to the court must not impair the very essence of the right."

Mr Sales QC places considerable reliance upon those cases, to which we will return.

22. At [34] and [35] Lord Bingham analysed the speeches in *Roberts*. He ultimately concluded this part of his speech thus at the end of [35]:

> "I would respectfully agree with the opinion of Lord Woolf in *Roberts*, para 83(vii), that the task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person (see also *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, para 10)."

On this footing, the question in each case is whether there has been significant injustice to the controlee. It appears to us that Baroness Hale, Lord Carswell and Lord Brown approached this question in a way which was significantly more favourable to the position of the SSHD than Lord Bingham. This can we think best be seen from the approach adopted to *AF* on the facts. Before we consider the reasoning in the majority speeches, it is convenient to summarise briefly the competing submissions. We should also note in passing that, so far as we are aware, the House of Lords did not consider any of the closed material in either *MB* or *AF*.

Submissions of behalf of SSHD

23. Mr Sales' submissions may be briefly summarised in this way:

i) While the overall right to a fair hearing cannot be infringed, its constituent rights are not absolute and must be balanced against the needs of the community, especially national security: see above and *Brown v Stott* per Lord Bingham at 704D-G.

ii) It is recognised that the court is faced with a difficult and sensitive task. It is concerned to balance what Mr Sales called a triangulation of different considerations and interests. First, there is the interest of the controlee to a fair hearing of the question whether there are grounds for suspicion. It is important in this regard to appreciate that whether there are such grounds is the question for decision; the existence of such grounds cannot be taken as the starting point. Secondly, there is the position of the secret services; both in the public interest and in the interest of those involved on the ground. Their information requires protection. It is important to note that the question is whether article 6 requires the disclosure of material which the court has by that stage ruled can be withheld on the grounds of national security. Thirdly (and of great importance), there is the right of the community as a whole to be protected against terrorist activities, which may threaten the life and safety of very many people.

iii) The reasons why the material which is gathered by the intelligence agencies and which the SSHD wishes to rely upon in control order proceedings cannot ordinarily be disclosed are perhaps self-evident but include: protecting the lives of agents and their families; maintaining the confidence of agents and thus the ability of the security services to recruit agents, to acquire intelligence on terrorist operations and to disrupt them; maintaining the secrecy of surveillance operations and their techniques and safeguarding the agencies'

ability to conduct or continue to conduct such operations; and ensuring that other operations are not prejudiced.

iv) Whether a limitation on a particular right under article 6 is permissible depends upon whether it pursues a legitimate aim and "represents no greater qualification than the situation calls for": *Brown v Stott ibid*. See also *Ashingdane v United Kingdom* (1985) 7 EHRR 528 at [57] (restrictions must pursue a legitimate aim and not destroy the essence of the right and be proportionate) and *R v Shayler* [2003] 1 AC 247 per Lord Hope at [69]: limitations on disclosure "must be rational, fair and not arbitrary, and they must impair the fundamental right no more than is necessary". In assessing these questions it is important to bear in mind that article 6 does not impose unvarying standards; account must be taken of the context, facts and circumstances of the particular case.

v) The particular context of control orders is exceptional. Their purpose is to place exceptional but necessary restrictions on individuals whom there are reasonable grounds for suspecting pose a terrorist threat.

vi) As stated above, the ECtHR has recognised the duty of states to take the measures needed to combat terrorism and the necessity to balance that duty against human rights: see eg the two principles in the Guidelines promulgated on 11 July 2002 by the Committee of Ministers of the Council of Europe quoted by Lord Bingham at [25] of his speech in *MB and AF*.

vii) In particular the ECtHR encouraged the use of special advocates in *Chahal* at [131]:

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 (see paragraph 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."

See also *Al-Nashif* and *Tinnelly*, referred to by Lord Bingham at [32]. Although Mr Sales recognises that the ECtHR made it clear in *Al-Nashif* at [97] that it was not expressing an opinion on the conformity of the United Kingdom system with the Convention, these cases show that the court was positively affirming that the state may legitimately rely upon closed evidence in proceedings relating to preventative measures for the protection of national security and that a possible (ie legitimate) way of reconciling the relevant

interests would be through the adoption of a special advocate procedure. See also *Charkaoui*.

viii) The above conclusion is borne out in particular by *Al-Nashif* at [137]:

> "The Court considers that in cases of the expulsion of aliens on grounds of national security – as here – reconciling the interest of preserving sensitive information with the individual's right to an effective remedy is obviously less difficult than in the above-mentioned cases where the system of secret surveillance or secret checks could only function if the individual remained unaware of the measures affecting him.
>
> While procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security" (see the above cited *Chahal* judgment and paragraph 96 above on possible ways of reconciling the relevant interests involved).
>
> 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."

ix) One of the features of the special advocate system which enhances the fairness of the procedure is that there is full disclosure of all relevant material to the special advocates, however secret or confidential the material may be. They can then deploy the material in the way most favourable to the controlee.

x) In these circumstances, it is clear from the approach of the ECtHR that it will only be in an exceptional case that the court should hold that the controlee has not, in the terms of *Chahal* at [131], been accorded a substantial measure of procedural justice or, in the terms of the last sentence of [35] in Lord

Bingham's speech in *MB and AF*, that the procedure (looked at as a whole) has involved a significant injustice to the controlee.

xi) It follows that there is no room for the principle that there is an irreducible minimum of information, whether in the form of the allegations or the evidence, which must as a matter of law or principle always be given to the controlee himself. Alternatively, depending upon the circumstances of the particular case, that minimum may be expressed in general terms or, put another way, at a relatively high level of generality.

xii) It may be necessary at a relatively high level of generality to protect sources of information and in some cases (as in the cases of MB and AF) the gist may not distinctly indicate an area of the case against the controlee. Nevertheless, as Mr Sales put it in a written note, this should usually be sufficient, after allowing for the role of the court in scrutinising the closed material, the role of the special advocate in scrutinising the closed material and taking account of any evidence the controlee is able to give to meet the state's fair trial obligations under article 6.

xiii) It is however accepted that there may be exceptional cases in which this is not the case, that is where the controlee is denied the very essence of the right under article 6, although this is subject to the 'Lord Brown exception'.

xiv) The 'Lord Brown exception' was implicitly (if not explicitly) approved by Baroness Hale and Lord Carswell and is in any event sound in law.

xv) If the 'Lord Brown exception' applies on the facts, and the judge can be sure that, whatever information were given to the controlee, it would make no difference to the conclusion that there were reasonable grounds for suspecting that he is or was engaged in terrorist-related activity, the procedure as a whole must be regarded as fair both to the controlee and to the SSHD. In that event there would be no infringement of the controlee's rights under article 6 in this context.

xvi) All depends upon the circumstances of the particular case.

xvii) These conclusions are consistent with the opinions of the majority in *MB and AF* and, in particular, with the approach of Baroness Hale to the decision of Ouseley J in *AF* to which we referred earlier.

xviii) There was no infringement of article 6 in any of the cases which are the subject of the appeal.

24. Mr Sales also submits that the effect of his submissions is that cases will be divided into two broad classes. The first class is the normal case, where the gist of the SSHD's case can be given at a high level of generality and where the closed material is comprised of a mosaic of information drawn in various combinations, depending on the particular case, from a variety of sources such as (1) intercept evidence, (2) covert surveillance evidence and (3) agent reporting. The second class is the exceptional case, where Mr Sales would accept that the individual is denied the very essence of his rights under article 6. Such a case would typically be a case in which the SSHD's

case depends centrally and predominantly upon some specific allegation of past terrorist activity.

25. Whatever the correct conclusion in this appeal and whether or not the submissions summarised in [23] above are accepted, we do not think that it can possibly be right to divide cases in such a mechanistic way. It may be that it is more likely that the court would hold that the controlee has been denied the very essence of the right to a fair trial in the second class of case but the facts of these cases vary almost infinitely and, whatever the correct principle, it cannot in our opinion be defined by reference to a rigid class of case.

Submissions on behalf of the controlees

26. The central point made on behalf of the controlees is that, while it is accepted that they are not entitled to full details of both the case against them and the evidence in support of it, they are entitled to an irreducible minimum of information. The case is not put in quite the same way on behalf of all of them, no doubt for good forensic reasons. Mr Pannick's submissions on behalf of AF can be summarised thus:

    i) The speeches in *MB and AF* establish that article 6 confers on the controlee a core irreducible entitlement to be told sufficient about the substance of the allegations to enable him to make a meaningful response unless (which is not here the case) the special advocates can defeat the SSHD's grounds for reasonable suspicion without disclosure to the controlee. How much need be disclosed in order to comply with this requirement will depend on the circumstances of the individual case. Here the disclosure in AF's case was plainly inadequate and the special advocates were not able to defeat the Secretary of State's case without AF being informed of the case against him.

    ii) Mr Sales relies upon the public interest in combating terrorism without disclosing secret information which would cause damage to the public interest, such as that which would undermine: agents or informants; surveillance operations and their techniques; the ability of UK intelligence agencies to continue to conduct effective terrorist operations. He also emphasises that a proper balance of the various public interests is secured by the use of special advocates. That approach was, however, that adopted by this court in *MB* (at [73], [79-80] and [83-86]), and was the approach held to be wrong in law in the House of Lords: see eg per Baroness Hale at [76]. The approach is, moreover, wrong in law because the controlee's core entitlement to know the gist of the case against him is fundamental and cannot be balanced against other public interests and because the role of the special advocate does not enable the controlee to play a meaningful part in the proceedings if he is not told the gist of the case against him.

    iii) It is no answer to the right to procedural fairness that the substance of the case against the controlee is so strong that there would be nothing he could usefully say. The 'Lord Brown exception' was approved by no other member of the appellate committee and is bad in law. The court cannot sensibly or accurately assess whether the controlee could have something of value to say unless and until the court knows what his answers are.

iv) Although the issue is whether the Secretary of State has reasonable grounds for suspicion, the standard of proof is a high one: see Lord Bingham in *MB* and *AF* at [24], with which Lady Hale and Lord Brown agreed at [56] and [90] respectively. A suspicion can only be reasonable in this context to the extent that an adequate substratum of fact has been proved to the criminal standard, or at least to the civil standard.

27. Mr Tim Owen QC put the case somewhat higher on behalf of AN. Other counsel adopted the submissions made by Mr Owen, and in case those were not accepted, they adopted the submissions of Mr Pannick. Mr Owen summarised his submissions in writing in the form of three core principles which he submits were established by *Roberts* and adopted in *MB and AF*:

> "1. Notwithstanding the national security context, every subject of a non-derogating control order retains a core, irreducible minimum entitlement to be able effectively to challenge/rebut the case against him (see final sentence, para 34, speech of Lord Bingham in *MB* and, accordingly the A6 right to a fair trial demands that every controlee receives sufficient disclosure to enable him, with or without a special advocate, to make such a challenge.
>
> 2. The appointment of a special advocate is not of itself a guarantee of compliance with the A6 right to a fair trial.
>
> 3. Decisions on what must be disclosed to achieve compliance with A6 are always fact sensitive and, thus, are necessarily incapable of categorisation into "usual" and "exceptional" cases."

Mr Owen's submissions are in essence the same as those of Mr Pannick except that his primary submission is, we think, that the controlee is entitled to be told both the case and the evidence against him, either the substance of it or in any event the gist of it.

Discussion

28. The question is which, if any, of those submissions is supported by the majority of the appellate committee in *MB and AF*. The test is expressed in much the same way in all the opinions. The task of the court identified by Lord Woolf in *Roberts* and adopted by Lord Bingham at [35] is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlee. Baroness Hale at [67] adopted the *Chahal* test, namely whether the proceedings have afforded a sufficient and substantial measure of procedural protection. She does not in any way criticise the approach of Ouseley J, which involved asking that very question: see his [167] quoted above.

29. At [81] Lord Carswell too quoted [131] of *Chahal* and referred to both *Al-Nashif* at [97] and *Tinnelly*, with their references to the role of the special advocates. He also noted that at [72] in *Tinnelly* the ECtHR stated that the limitations to the individual's rights under the Convention must not restrict or reduce his access to the court "in such

a way that the very essence of the right is impaired". Lord Carswell also referred at [82] (as Lord Bingham had done at the end of [35]) to Lord Woolf's reference in *Roberts* which he quoted in full:

> "What will be determinative in a particular case is whether looking at the process as a whole a decision has been taken by the board using a procedure that involves significant injustice to the prisoner."

It is important to note the stress placed by Lord Carswell on looking at the process as a whole. He also stressed that the question was one of balance. He said at [83]:

> "In the present case one has to balance two interests, that of the controlee and the public interest, without the added factor of protecting the informant. Both interests are clear and strong, but in my opinion it is possible to accommodate both with an appropriate balance."

30. For his part, Lord Brown did not express the question as one of balance but nevertheless recognised that the ordinary principles applicable to the question whether there has been an infringement of the right to a fair trial under article 6 must be displaced by asking whether in all the circumstances there had been "a fundamentally unfair hearing". He put it thus at [91]:

> "I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing."

It is plain from the last part of Lord Brown's [90], which we quote below, that he equates a fundamentally unfair hearing with significant injustice to the suspect or his not being accorded even a substantial measure of procedural justice or the very essence of his right to a fair hearing being impaired. It seems to us that these are indeed in essence the same test.

31. There are some striking features of the majority opinions. It is we think clear that the majority all thought that their opinions would lead to the conclusion that in the majority of cases, perhaps the great majority of cases, their approach would lead to a position in which (without disclosure to the controlee personally of material contrary to the public interest) the controlee would have a substantial measure of procedural protection and would not have been subject to significant injustice. Baroness Hale

said at [66] that she could not be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used would be sufficient to comply with article 6 (her emphasis). She added at [68] that there may still be a few cases in which that is not possible. At [73] she said that there is good reason to think that Strasbourg will find proceedings conducted as she contemplated to be compatible with the Convention in the majority of cases.

32. It is we think a reasonable inference that Lord Carswell took a similar view from the last two sentences of [85], where he said this:

> "I do consider, however, that there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6."

Lord Brown too thought that, if the approach of the majority were adopted, it was "highly likely" that the special advocate procedure would safeguard the suspect from significant injustice, although he recognised that it would not invariably do so: see [90] quoted below.

33. As to standard of proof, we do not accept Mr Pannick's submissions. We accept Mr Sales' submission that the matter is resolved by the decision of this court in *MB*, where it was a live issue between the parties. Lord Phillips CJ, giving the judgment of the court, said this at [67]:

> "The PTA authorises the imposition of obligations where there are reasonable ground for suspicion. The issue that has to be scrutinised by the court is whether there are reasonable grounds for suspicion. That exercise may involve considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on the balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether the matrix amounts to reasonable grounds for suspicion and this exercise differs from that of deciding whether a fact has been established according to a specified standard of proof. It is the procedure for determining whether reasonable ground exist which has to be fair if article 6 is to be satisfied."

34. That part of the decision in *MB* was not the subject of an appeal to the House of Lords and is binding on us. Since then this court has followed it in an earlier appeal in this very case: see [2008] EWCA Civ 117 at [33]. In these circumstances we accept Mr Sales' submission that in [24] Lord Bingham cannot have intended to do more than refer to cases like *McCann*, which related to an entirely different statutory scheme, in support of a general point that the procedural protections must be commensurate with the gravity of what is at stake. In any event, nowhere in *MB and AF* does the House of Lords disagree with the approach set out at [67] of this court's judgment in *MB*.

Finally, we see nothing in the EU Citizen's Rights Directive, which was relied upon on behalf of the controlees, to contradict that approach.

35. We would only add in this regard that when *AF* was before Ouseley J, he, in our opinion correctly, drew attention to the nature of the exercise upon which the court is engaged under section 3(10) of the PTA 2005. He said this at [61] in the context of a ruling he had given that he would not hold a failure on the part of AF to give evidence against him:

> "… briefly, the standard of proof upon the SSHD is not high, and he must have established his case to that level before there is anything which calls for an answer, and he cannot reach that stage by reliance upon AF's silence or refusal to answer questions; …"

It is important to have in mind that, by contrast with derogating control orders, in cases of non-derogating control orders the question is not whether the SSHD has proved on the balance of probabilities that the controlee is or has been involved in terrorism-related activities but, simply, whether there are reasonable grounds for suspicion. This is because the PTA 2005 draws a clear distinction between deprivation of liberty on the one hand, for which derogation is required and interference with liberty not amounting to deprivation of liberty on the other hand, for which derogation is not required: see eg *JJ* per Lord Bingham at [12-19]. There has been no challenge to the statutory test of reasonable grounds for suspicion. This is not perhaps surprising, given that in *Fox Campbell and Hartley v United Kingdom* (1990) 13 EHRR 137 the ECtHR, when considering a similar test, said at [32] that:

> "having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."

36. We return therefore to the question whether *MB and AF* is authority for the proposition that an irreducible minimum of information which must be given to the controlee and, if so, what that minimum is. The submission that the majority of the House of Lords has decided that there is such an irreducible minimum may be summarised as follows:

i) At [34], after reviewing the speeches in *Roberts*, Lord Bingham said this:

> "I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him."

ii) Lord Bingham had said a little earlier in [34] that Lord Woolf had accepted in *Roberts* at [68] that there was a "core, irreducible minimum entitlement" for a life prisoner to be able effectively to test and challenge before the Parole Board any evidence which decisively bore on the legality of his detention. At [43] Lord Bingham said that he understood the House to have accepted in *Roberts* that the concept of fairness imports a core, irreducible minimum of procedural protection. He also said at [44] that "a majority of my noble and learned friends are of my opinion on the principles relevant to this issue", by which he meant the fairness issue.

iii) It is clear from the speeches of Lord Woolf in *Roberts* and Lord Bingham in *MB* and *AF* that the core, irreducible minimum referred to was a reference to disclosure to the prisoner or controlee in person.

iv) At [90] Lord Brown said that he agreed with much of Lord Bingham's opinion. In particular he said that he agreed with Lord Bingham's "convincing analysis of the authorities at paras 25 to 34" and with his conclusion at [35] that the court's task in any given case is to decide whether the process as a whole has occasioned significant injustice to the suspect.

v) Baroness Hale referred at [58] to the basic requirement being to know the case against one and to have an opportunity of meeting it, although she was there stating the general rule in civil cases. As stated above, she then set out some limitations on that principle, both at common law and under the Convention. At [65] and [66] she discussed the likely approach of the ECtHR and the way she anticipated the process working in a case where not all the information is disclosed to the controlee. These are important paragraphs, to which we return below, but they do not in our opinion provide specific support for the proposition that there is an irreducible minimum which must be disclosed to the controlee. There may however be some support for the controlees' submissions in [68] of Baroness Hale's speech.

vi) In [68] she said this, after referring in [67] to the approach of Ouseley J (see below):

> "But there may still be a few cases in which, under the scheme set out in the 2005 Act and rules, this is not possible. The material which is crucial to demonstrating the reasonable basis of the Secretary of State's suspicions or fears cannot be disclosed in any way which will enable the controlled person to give such answer as he may have. What is to happen then?"

By 'this' Baroness Hale meant that it was not possible to reach a conclusion to the effect that the controlee had received a sufficient and substantial measure of protection. She then considered a number of specific provisions of the PTA 2005 and CPR rule 76 and concluded that, since the PTA and the rules prohibit an order for disclosure to the controlee, even where the judge considers that it is essential in order to give the controlee a fair hearing to order disclosure, he is on the face of it precluded from doing so. Baroness Hale then discussed what should happen then: see [69-73].

vii) At [74], Baroness Hale said that it was quite possible to provide the controlee with procedural protection even though "the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed". The inference is that procedural protection would not be possible if no relevant information had been given to him.

viii) Some reliance is placed on the last paragraph of the speech of Lord Carswell at [87]. However, for the reasons given below, it is our view that it does not support the controlees' submission.

37. Against the conclusion that the majority held that there is an irreducible minimum which must be disclosed to the controlee and not only to the special advocates are two considerations which seem to us to be to lead to the opposite conclusion. They are first the contrast between the approach of the majority on the one hand and that of Lord Bingham on the other to the facts of the two cases and the secondly the 'Lord Brown exception'. We take them in turn.

38. Lord Bingham thought it plain that neither MB nor AF could have a fair trial of the critical issue. As to MB he said at [41]:

> "The Council of Europe Commissioner for Human Rights, in paragraph 21 of his report referred to above (para 16), and the Joint Committee on Human Rights, in paragraph 76 of its report referred to above (para 16), had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person has no effective opportunity to challenge or rebut. This is not a case (like *E*) in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired."

39. In the light of those conclusions, it seems very likely that, left to himself, Lord Bingham would have held that MB could not have a fair trial. Yet the majority decided to remit the case to the High Court. This points to the conclusion that the principles adopted by Lord Bingham were not the same as those adopted by the majority. There were, however, particular reasons for remitting the case of MB: see per Baroness Hale at [75], Lord Carswell at [86] and Lord Brown at [92]. The position is much clearer in the case of AF.

40. As to AF, Lord Bingham concluded at [43] that his was an even stronger case than that of MB. He had set out at [42] the position before Ouseley J, which we have done in rather more detail. In short, the essence of the SSHD's case was in the closed material. AF did not know what the case against him was because no allegation was

disclosed to him or even gisted for him. The essence of the SSHD's case was entirely unknown to him. Lord Bingham's short conclusion was this at [43]:

> "This would seem to me an even stronger case than *MB*'s. If, as I understand the House to have accepted in *Roberts*, above, the concept of fairness imports a core, irreducible minimum of procedural protection, I have difficulty, on the judge's findings, in concluding that such protection has been afforded to AF. The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB*'s, it seems to me that it was not."

41. Baroness Hale's approach was very different. She said at [67]:

> "The best judge of whether the proceedings have afforded a sufficient and substantial measure of procedural protection is likely to be the judge who conducted the hearing. It is highly significant that, in *AF* Ouseley J concluded, at …, para 167:
>
> > "I should add that looking at the nature of the issue, namely necessary restrictions on movement in an important interest, and at the way in which the Special Advocates were able to and did deal with the issues on the closed material, I do not regard the process as one in which AF has been without a substantial and sufficient measure of procedural protection."
>
> That is a judgment with which any appeal court should be slow to interfere."

42. We have set out the approach and reasoning of Ouseley J in some detail at [13] to [17] above. It is striking that Baroness Hale did not say that, given that nothing of any real materiality (not even a gist of the allegations) was disclosed to AF, and, given the fact that the special advocates had made no progress on the facts, it followed from her view of the principles to be applied that the hearing before Ouseley J could not have been a fair hearing. The fact that she did not so conclude, whereas Lord Bingham did, shows that their respective approaches were different in principle, or at least involved a different interpretation of a common principle. If the principle which she espoused led to the conclusion that Ouseley J's conclusion in [167] was wrong in principle, she would surely have said so.

43. Moreover, Baroness Hale did not say that the principle applied by Ouseley J was wrong. She did not, for example, say that when he referred in [173] to the fact that in neither *Chahal* nor *Charkaoui* was there any suggestion of an irreducible core of allegation or evidence that had to be made available with a special advocate system in place, and when he thus rejected the submission that such an irreducible core was necessary, he was wrong so to hold. She would surely have done so had that been her view.

44. Not only did she not say so, but the opposite is clear from her [74], when read as a whole. It reads:

> "It follows that I cannot share the view of Lord Hoffmann, that the use of special advocates will always comply with article 6; nor do I have the same difficulty as Lord Bingham, in accepting that the procedure could comply with article 6 in the two cases before us. It is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed."

As we see it, Baroness Hale is there clearly saying that it is possible for a sufficient measure of protection to be afforded even where the whole case is in closed material and none of the case has even been gisted. It is common ground that was true of both *MB* and *AF*. So, unlike Lord Bingham, Baroness Hale did not have a difficulty in accepting, as a possibility, that the procedure could comply with article 6 even though the controlee was not even told the gist of the case against him. All depends upon the circumstances.

45. The same point also appears in the speech of Lord Carswell. He said at [87]:

> "In AF's case Ouseley J accepted at paragraph 146 of his judgment that "no, or at least no clear or significant, allegations of involvement in terrorist-based activity are disclosed by the open material, nor have any such allegations been gisted." Again, this finding has not been challenged. As in MB's case, it is difficult to see how this could constitute a fair hearing, unless the contribution of the special advocate was such as to make a significant difference. At paragraph 167 the judge referred to "the way in which the Special Advocates were able to and did deal with the issues on the closed material", but it is not spelled out in the judgment how significant their contribution was. The judge has not made a decision on the overall fairness of the hearing and its compliance with article 6, and in these circumstances I would allow the Secretary of State's appeal, reverse the judge's order quashing the control order and send the case back to the Administrative Court for reconsideration in the light of the opinions expressed by the House."

Lord Carswell does not say that, absent at least some gisting, the procedure must be unfair unless the special advocate succeeds in defeating the SSHD's case. If that were his view, since Ouseley J held that this was not a case in which AF has been without a substantial and sufficient measure of procedural protection, it would follow that the special advocate had failed to defeat the SSHD's case and, if the controlees' submission as to what the majority meant were correct, the issue would have been decided in favour of AF. Yet it was not but was remitted.

46. While neither Lord Carswell nor Lord Brown understandably used the same language as Baroness Hale, we do not think that there is any reason to think that they disagreed in any significant respect. Baroness Hale plainly thought that they were in agreement because at the very beginning of her speech at [56] she said that her approach on the fairness issue was somewhat different from that of Lord Bingham but was an approach:

> "which I understand to be shared by my noble and learned friends, Lord Carswell and Lord Brown of Eaton-under-Heywood."

There is no suggestion in either the speech of Lord Carswell or that of Lord Brown that either disagreed with the other or with Baroness Hale. In so far as there are express references to the opinions of others they are references of agreement: see per Lord Carswell at [86] and per Lord Brown at [92], although it is fair to say that in each of those cases the reference is to particular parts of the debate.

47. In all these circumstances, it seems to us that the majority was not accepting the controlees' submission that, in the absence of disclosure or gisting, there will be an infringement of article 6 unless the special advocate defeats the SSHD's case. We should add that, contrary to Mr Pannick's submission, this conclusion does not involve reverting to the view of this court in *MB*. The absence of disclosure or gisting remains a very important consideration in deciding whether, viewed as a whole, there has been a fundamentally unfair hearing with significant injustice to the suspect or, put another way, the controlee has not been accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing has been impaired. We return below to the importance of disclosure and gisting and of what the majority thought could be done about ensuring that practical steps are taken to protect the controlee's rights under article 6.

48. We turn to the second consideration which seems to us to support the above conclusion. It is what has been described as the 'Lord Brown exception', although it is not in our opinion correct to describe it in that way because, as we see it, it is simply part of what Lord Brown regarded as the larger question, which, as appears from [92], was the question remitted, namely whether there has been an overall fairness in the process. The whole of the debate, including the relevance and application of the supposed exception is as we see it part of the question whether the section 3(10) hearing sufficiently complies with article 6 in the particular case. Thus Lord Brown's [90] to [92] must be read together. Having regard to his forceful endorsement of the fundamental requirement of a fair hearing in [91], his 'exception' cannot have been intended to mean that, despite the extent of open disclosure being unfair, the case for the SSHD could be so strong as to succeed, while being unfair to the controlee.

49. Lord Brown put the principles thus at [90]

> "With regard to AF's cross appeal on the article 6 issues, and MB's appeal against the Court of Appeal's ruling that section 3 of the 2005 Act is compatible with his right to a fair hearing under article 6 of the Convention, I agree with much of Lord Bingham's opinion. In particular I agree with his conclusions at paragraph 24 that non-derogating control order proceedings do not involve the determination of a criminal charge but that nevertheless those against whom such orders are proposed or made are entitled to such measure of procedural protection as is commensurate with the gravity of the potential consequences. I agree too with Lord Bingham's convincing analysis of the authorities at paras 25 to 34 and his conclusion at para 35 that

> the court's task in any given case is to decide whether the process as a whole has occasioned significant injustice to the person concerned (the suspect). I agree further that the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so. There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at — consider, for example, the judge's remarks in AF's own case, set out by my noble and learned friend Baroness Hale of Richmond at para 67 of her opinion), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even "a substantial measure of procedural justice" (*Chahal v United Kingdom* (1996) 23 EHRR 413 at para 131) notwithstanding the use of the special advocate procedure; "the very essence of [his] right [to a fair hearing] [will have been] impaired" (*Tinnelly & Sons Ltd* and *McElduff and others v United Kingdom* (1998) 27 EHRR 249, para 72).”

50. In our view, Lord Brown’s consideration of the extent to which open disclosure of particular aspects of the case will assist a challenge to the case for the SSHD that there are reasonable grounds for suspecting that the controlee is or has been involved in terrorism-related activity was all conducted within the article 6 debate. The questions for consideration include asking what difference non-disclosure to the controlee will make, having regard to the nature of the material and having regard to the fact that it has been disclosed to the special advocates and to the way they have been able to deal with it. In our opinion it is clear from the last part of [90] and from [92] that Lord Brown took the view that, where, with the assistance of the special advocate, the judge can be sure that no possible challenge to the SSHD’s case on reasonable suspicion could possibly succeed, the controlee will not have been subject to significant injustice, when the process is considered as a whole.

51. That Lord Brown regarded that question as part of the overall analysis is, as we see it, clear from the last two sentences of his [90], which it is worth repeating (omitting the case references):

> “Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at — consider, for example, the judge's remarks in AF's own case, set out by my noble and learned friend Baroness Hale of Richmond at para 67 of her opinion), he would have to

> conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even "a substantial measure of procedural justice" … notwithstanding the use of the special advocate procedure; "the very essence of [his] right [to a fair hearing] [will have been] impaired" …."

In those sentences, including the reference to Baroness Hale's [67], where she quoted [167] of the judgment of Ouseley J (quoted above), Lord Brown made it clear that he regarded this question as part of the overall question to be answered and that he regarded it as part of the analysis carried out by Baroness Hale. Lord Brown certainly did not think that his analysis was different from that undertaken by the other members of the majority.

52. It is true that neither Baroness Hale nor Lord Carswell expressly refers to the point, although Baroness Hale said this at [65]:

> "However, it is necessary to go further than that, and ask whether the use of a special advocate can solve the problem where the Secretary of State wishes to withhold from the controlled person material upon which she wishes to rely in order to establish her case. We are all agreed that these are not criminal proceedings for the purpose of article 6; in ordinary civil proceedings it is appropriate to give weight to the interests of each side; nevertheless, the state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy, in some cases seriously. It seems probable that Strasbourg would apply very similar principles to those applicable in criminal proceedings, but would be more inclined to hold that the measures taken by the judicial authorities had been sufficient to protect the interests of the controlled person. It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been "given a meaningful opportunity to contest the factual basis" for the order: see *Hamdi v Rumsfeld* 542 US 507 (2004), 509, col 2, O'Connor J.

53. Baroness Hale says that one of the questions to be asked is what difference disclosure to the controlee might have made. That is in essence the question which Lord Brown asks when he suggests that one relevant question to ask is whether a challenge to the SSHD's case on reasonable suspicion could conceivably have succeeded. We recognise that Baroness Hale does not spell it out in quite that way but nowhere does

either she or Lord Carswell express disagreement with this part of Lord Brown's speech.

54. The essence of Lord Carswell's opinion is in [85]:

> "There is a very wide spectrum of cases in which closed material is relied on by the Secretary of State. At one extreme there may be cases in which the sole evidence adverse to the controlee is closed material, he cannot be told what the evidence is or even given its gist and the special advocate is not in a position to take sufficient instructions to mount an effective challenge to the adverse allegations. At the other end there may be cases where the probative effect of the closed material is very slight or merely corroborative of strong open material and there is no obstacle to presenting a defence. There is an infinite variety of possible cases in between. The balance between the open material and the closed material and the probative nature of each will vary from case to case. The special advocate may be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee. These are matters for the judge to weigh up and assess in the process of determining whether the controlee has had a fair trial. The assessment is, as Lord Woolf said in *Roberts* at paragraph 77, fact-specific. The judge who has seen both the open and the closed material and had the benefit of the contribution of the special advocate is in much the best position to make it. I do consider, however, that there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6."

We do not see anything in that paragraph which is inconsistent with Lord Brown's approach. It stresses the balance to be struck between the competing interests.

55. It is submitted that the effect of the 'Lord Brown exception' is that the judge must first consider whether the controlee has had a fair trial and then, even if the answer is no, may still conclude that the SSHD is entitled to succeed provided only that he or she can be sure that disclosure would have made no difference. We will refer to that submission as involving a 'radical exception' to the principle of fairness. We have already expressed our view that that is not Lord Brown's approach because the last part of [90], [91] and [92] show that his view is that the ultimate question is whether, viewed as a whole, the proceedings are fair. It seems to us that, if either Baroness Hale or Lord Carswell had thought that Lord Brown was introducing such a radical exception, they would be bound to have dealt with it. Such a radical exception would have been a point of such importance that it would not have gone unnoticed or unnoted. The inference must be that Baroness Hale and Lord Carswell contemplated that what Lord Brown was saying all formed part of the analysis of the question whether there was a breach of article 6.

56. What seems to us to have led to an argument that Lord Brown intended a more radical exception is his use of the expression "unless in these cases the judge can nevertheless feel quite sure", and the inference that the difference that open disclosure might make will only be a relevant consideration in deciding whether further open disclosure is necessary in cases where that degree of certainty exists. In our view the difference that open disclosure could make will almost always be a factor, as Lady Hale contemplates in her [65] quoted above. That difference (if any) has to be assessed in the context of a number of factors including: what has already been disclosed openly; the fact that full disclosure has been made to the special advocates; what further material they have submitted they need from the controlee in order successfully to challenge evidence in the closed proceedings; how they have been able to deal with the material in the closed proceedings; and how powerful and irrefutable the material is in support of what is the low threshold of "reasonable suspicion". One can of course understand that the more powerful the material and the more danger there is to national security if any part of it is disclosed openly, and thus the less instructions a special advocate can obtain, the more certain a judge will feel that he or she must be that open disclosure will make no difference and that an injustice has not been done. This is what we believe Lord Brown had in mind in using the language he did. In these circumstances we are of the view that what Lord Brown said is not properly to be regarded as the 'Lord Brown exception', or indeed an exception at all, but part of the majority view as to the correct approach.

57. We recognise that, if Lord Brown were expressing a radical view of the kind suggested, there would be powerful arguments against his approach. For example, Stanley Burnton J took the view that it would be to confuse substance with procedure. Moreover, experience shows that clear cases sometimes turn out to be less clear and that the stronger the case is or appears to be the more important it is that the defendant has an opportunity to contest it. In his first judgment Stanley Burnton J referred at [51] to what he described as the wise words of Megarry J in *John v Rees* [1970] Ch 345, 402:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

Those are powerful views of great force. Moreover, although there are cases in which a judge admits material which is subsequently held to be inadmissible and it is held to have made no difference and, indeed, in a criminal context there are cases in which a verdict is held to be safe notwithstanding some material irregularity, in all of them the relevant party, at any rate at the appeal stage, knows what the case and evidence against him is and has had an opportunity of addressing the point and adducing relevant evidence.

58. We recognise the force of the views to like effect expressed by Sedley LJ in his judgment, a copy of which we have seen in draft before finalising this judgment. However, in our opinion this is not a case, as he puts it, of an otherwise unfair hearing becoming fair as a result of the application of the 'Lord Brown exception'. Moreover, that is not a doctrine which we espouse.

59. In the present context, the authorities show that the question whether the controlee has suffered an injustice must be considered by reference to the process as a whole. It is well settled that the approach of the ECtHR is a pragmatic one. It is common ground that the ordinary rule that a party is entitled to know both the case against him and the evidence against him must be modified because of the importance of national security. The question is how and to what extent the ordinary rule should be modified. The problem only arises where it is shown, and accepted by the court, that the interests of national security require that the relevant information is not disclosed to the controlee. In these circumstances the approach of testing the difference open disclosure would or might make seems to us to be consistent with seeking to ascertain whether a significant injustice has been done by non-disclosure and to be entirely understandable. Indeed, it seems to us that the ECtHR would almost certainly hold that the nature and extent of that difference are relevant and should be taken into account in deciding whether the controlee has been subject to significant injustice.

60. If the question is what the overall justice of the case requires, then, as Lord Rodger said in *Roberts* at [111] in the passage quoted by Ouseley J and as Lord Carswell said at [85], there is a balance to be struck. If the judge can properly conclude on the evidence available to him or her, which is of course all the evidence, and with the assistance of a special advocate, who of course sees all the evidence, that disclosure would make no difference to the answer to the question whether there were reasonable grounds to suspect that the controlee is or was involved in terrorist related activity, it seems to us to be an entirely proper conclusion that, viewed as a whole, the process is not unfair and that there has been no significant injustice to the controlee.

61. The question is why, in these circumstances Lord Brown used the language of being sure and neither Baroness Hale nor Lord Carswell did. One view is that they disagreed but there is no other indication that they were other than fully in agreement as to the correct approach. Baroness Hale treats the question what difference further disclosure might make as one of the factors for the judge to take into account: see her [65] quoted above. There is no suggestion that Lord Carswell did otherwise. It appears to us that the explanation is that, where Lord Brown refers to the case where the "judge can feel quite sure that in any event no possible challenge could succeed", he has in mind the kind of case in which, as in *AF*, nothing or almost nothing has been disclosed to the controlee. This seems clear from his reference to Baroness Hale at [67] and her reference to the judgment of Ouseley J. In such a case all will depend upon what the special advocates can achieve and, of course, upon the nature of the

evidence advanced on behalf of the SSHD. If nothing or almost nothing has been disclosed, a judge is likely to be very reluctant indeed to uphold a control order on the basis that disclosure will make no difference unless he is sure that that is the case.

62. The weight to be given to a particular factor will depend upon all the circumstances of the case. As we see it, this will always be so when the decision involves a balancing of different factors. Some may have little weight and some great weight and others appropriate weight in between. How much weight should be given to a particular factor is itself a matter of judgment and will or may depend upon the weight to be given to other factors, one of which will of course be the amount of information in fact given to the controlee. As we see it, Lord Brown was simply giving an example of an approach in a case where little if anything has been disclosed openly to the controlee. It is in our view important to have in mind throughout that the question is not whether he is or has been engaged in terrorist-related activity, which would be the usual subject matter for a trial (and would be the question in the case of a derogating control order), but whether there are reasonable grounds for suspicion.

63. These conclusions seem to us to underline the conclusion we expressed above that the majority did not contemplate an irreducible minimum. They contemplated that as much as possible should be disclosed but recognised that there might be cases in which little or nothing could be disclosed. In each case all relevant factors are to be taken into account in order to answer the underlying questions identified by Lord Brown in [92].

64. In all these circumstances our conclusions based on the decision in *MB and AF* are these:

i) The question is whether the hearing under section 3(10) infringes the controlee's rights under article 6. In this context the question is whether, taken as a whole, the hearing is fundamentally unfair in the sense that there is significant injustice to the controlee or, put another way, that he is not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing is impaired. More broadly, the question is whether the effect of the process is that the controlee is exposed to significant injustice. In what follows 'fair' and 'unfair' are used in this sense.

ii) All proper steps should be made to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting.

iii) Where the full allegations and evidence are not provided for reasons of national security at the outset, the controlee must be provided with a special advocate or advocates. In such a case the following principles apply.

iv) There is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there is, the irreducible minimum can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed.

v) Whether a hearing will be unfair depends upon all the circumstances, including for example the nature of the case, what steps have been taken to explain the detail of the allegations to the controlled person so that he can anticipate what the material in support might be, what steps have been taken to summarise the closed material in support without revealing names, dates or places, the nature and content of the material withheld, how effectively the special advocate is able to challenge it on behalf of the controlled person and what difference its disclosure would or might make.

vi) In considering whether open disclosure to the controlee would have made a difference to the answer to the question whether there are reasonable grounds for suspicion that the controlee is or has been involved in terrorist related activity, the court must have fully in mind the problems for the controlee and the special advocates and take account of all the circumstances of the case, including the question what if any information was openly disclosed and how effective the special advocates were able to be. The correct approach to and the weight to be given to any particular factor will depend upon the particular circumstances.

vii) There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere.

65. We should note that, since the end of the hearing and before we were able to prepare our judgments, on 3 September 2008, the European Court of Justice ('the ECJ') delivered judgment in joined cases C-402/05 P and C-415/05 P, namely *Kadi and Yusuf v Council of the European Union*. The ECJ annulled Council Regulation (EC) No 881/2002, which imposed certain measures against specific persons and entities associated with the Al Qaeda network and the Taliban, in so far as it related to the applicants. As counsel for AF put it, amongst other things the applicants complained that they could not mount an effective challenge to their listing as persons to whom the measures applied.

66. The Court of First Instance ('the CFI') held that the measures were temporary, precautionary and restricted the availability of the applicants' property and that, notwithstanding a strong expression of view to the contrary by Advocate General Maduro, held that it was not necessary for the facts or evidence against a person or entity to be disclosed in circumstances where the UN Security Council or its sanctions committee was of the view that there were grounds relating to the security of the international community that militated against it. The ECJ reversed the decision of the CFI. It held at [334] that:

> "rights of defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected."

67. In their note counsel for AF submit that the ECJ held that the grounds and the evidence relied upon must be communicated to the relevant person or entity in order for them to be in a position to put forward any defence to their listing. Counsel further set out long passages from the judgment at [335-353] and submit, in effect, that the same approach should be applied here. Those passages certainly support in strong terms the general rule to which we referred earlier at [19] that a person is

entitled to know the case and evidence against him so that he may respond to it. However, as explained at [20-22], it is common ground that those rights are not absolute and in this appeal we have tried to ascertain the correct approach in the present context identified by the majority of the House of Lords in *MB and AF*.

68. We do not think that, beyond underlining the basic principles, the decision of the ECJ is of real assistance in reaching a conclusion in this case. In particular, it is correct to observe, as counsel for the SSHD submits, that the ECJ was not directly concerned with the extent to which it is permissible, where judicial review of a decision to impose a particular restrictive measure on an individual is available, to withhold on public interest grounds evidence or material from the relevant person. The SSHD relies upon [342-344] as follows:

> "342. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.
>
> 343. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.
>
> 344. In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal* v. *United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131)."

69. We accept the submission made on behalf of the SSHD that the ECJ there had very similar considerations in mind to those considered by the House of Lords in the context of control orders in *MB and AF*. In these circumstances, we are not persuaded that the reasoning in *Kadi and Yusuf* leads to any conclusions different from those we summarised in [64] above.

70. Having reached those conclusions, we nevertheless wish to stress the importance of the second of them, namely the importance of the controlee being given the maximum

possible information consistent with the national interest. All members of the majority and Lord Bingham stress the importance of this. We wish to stress the fact that our conclusion that there is no irreducible minimum as a matter of law does not mean that there will not be cases in which failure to provide a sufficient gist (or perhaps evidence) will lead to the conclusion that the hearing is not fair. All will depend upon the particular circumstances.

71. It is in this connection that we wish to stress the importance of the approach of Baroness Hale to the way the system should work. She plainly thought (and we respectfully agree) that it is of the utmost importance that all those concerned with the operation of the control order system should do their utmost to make it work in such a way that it neither infringes the public interest nor the fundamental rights of the controlees. Baroness Hale stressed this aspect of the system at [66]:

> "I do not think that we can be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and Part 76 of the Civil Procedure Rules, would be sufficient to comply with article 6. However, with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person "a substantial measure of procedural justice". Everyone involved will have to do their best to ensure that the "principles of judicial inquiry" are complied with to the fullest extent possible. The Secretary of State must give as full as possible an explanation of why she considers that the grounds in section 2(1) are made out. The fuller the explanation given, the fuller the instructions that the special advocates will be able to take from the client before they see the closed material. Both judge and special advocates will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases: see Serrin Turner and Stephen J Schulhofer, *The Secrecy Problem in Terrorism Trials*, 2005, Brennan Centre for Justice at NYU School of Law. Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge."

72. We have a real concern that not everyone sees the problem in quite the same way. For example, at [35], after referring to the fact that, once the special advocate sees the

closed material, he cannot seek instructions from the controlee without permission, Lord Bingham added that he understood that in practice such permission is not given. Lord Bingham was of course there referring to CPR rules 76.25, 76.28 and 76.29: see the summary at his [27] quoted at [6] above. We have had the benefit of detailed submissions and information from the special advocates as to how the system works and have been told that the obtaining of instructions with permission "is a useful option only in very rare cases" and "is not in practice a significant contribution to the fairness of the procedure". By contrast, Silber J thought that it was an important right available to special advocates and Baroness Hale thought that their ability to put "specific and carefully tailored questions" to the controlee had the potential to add significantly to the measure of procedural protection afforded to him.

73. The special advocates have expressed concern that, because the SSHD has a right to object, the request would only be likely to be granted in relation to allegations by the SSHD which are already part of the open case. Mr Sales submits that this is too pessimistic an approach and draws attention to a recent case called AP where permission was granted to ask such questions. There is also a suggestion that, if the controlee does not answer the question, his silence would be used against him and an adverse inference drawn against him. Mr Sales refutes that suggestion and draws attention to the approach of Ouseley J to the refusal of AF to give evidence referred to above.

74. Each case of course depends upon its own facts but the doubts expressed by the special advocates seem to us to be too gloomy, especially in the light of the hopes expressed by Baroness Hale in her [66] quoted above. It is clear that there is in practice an ongoing dialogue between the special advocates and the representatives of the SSHD in every case which is very encouraging and, if the flexible approach contemplated by Baroness Hale is adopted, it seems likely to us that, with an appropriately flexible attitude on the part of the SSHD, it will be possible to afford the controlee with an appropriate measure of procedural protection. While we understand the point that the public interest is of the utmost importance, common sense suggests that there may be more than one view of what the public interest requires in any particular case, especially now that it has been held by the House of Lords that the relevant provisions of the PTA 2005 and CPR Part 76 should be read down so as to take effect only when it is consistent with fairness for them to do so.

75. Baroness Hale described the position thus at [72]:

> "In my view, therefore, paragraph 4(3)(d) of the Schedule to the 2005 Act, should be read and given effect "except where to do so would be incompatible with the right of the controlled person to a fair trial". Paragraph 4(2)(a) and rule 76.29(8) would have to be read in the same way. This would then bring into play rule 76.29(7), made under paragraph 4(4) of the Schedule. Where the court does not give the Secretary of State permission to withhold closed material, she has a choice. She may decide that, after all, it can safely be disclosed (experience elsewhere in the world has been that, if pushed, the authorities discover that more can be disclosed than they first thought possible). But she may decide that it must still be withheld. She cannot then be required to serve it. 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 upon it, and it is indeed crucial to the decision, then the decision will be flawed and the order will have to be quashed."

The principles adopted by Silber J in AE

76. The conclusions of principle which we have expressed so far seem to us to be consistent with those of Silber J in his two open judgments in AE. The first, [2008] EWHC 132 (Admin), was dated 1 February 2008 and the second, [2008] EWHC 585 (Admin), was dated 20 March 2008. In the first the question was whether the hearings until then, which had taken place on 11-14 and 20 June and 4, 5 and 8 December 2007, were compatible with AE's rights under article 6. Silber J also produced a closed judgment dated 10 January 2008 at which the SSHD was put to her election and on 17 January the SSHD elected to withdraw some of the material which she had previously relied upon against AE. That closed judgment in our view shows the careful approach which was adopted by Silber J throughout.

77. In his first open judgment Silber J analysed the decision in *MB and AF* in some detail, much as we have tried to do and, as we see it, he reached much the same conclusions as we have done. In addition he referred at [30] to what was perhaps the first decision after that of the House of Lords in *MB and AF*, namely *Re Bullivant* [2007] EWHC 2938 (Admin), where Collins J said at [11] that after that decision it was "the final picture that needs to be looked at". We note in passing that Collins J also said at [7] that on the House of Lords' approach there is no irreducible minimum.

78. Silber J explained at [32] that as a result of the representations of AE's leading special advocate, Mr Michael Supperstone QC, the SSHD made further disclosure to AE over and above what she had initially provided. He held at [33] that, in the light of the further disclosure, AE was still able to deal with those matters by way of further cross-examination or by adducing evidence. He thus held that there had been no infringement of his article 6 rights so far but that he would keep the position under review at the next hearing. Thus Silber J proceeded on the basis of a step by step approach and held a further hearing between 4 and 8 February in which he considered, among other things, whether there was any infringement of AE's rights under article 6.

79. Silber J prepared a second closed judgment, which is dated 10 March, although it refers to the accompanying open judgment which is dated 20 March and, as already stated, is his second open judgment. In his second closed judgment Silber J discussed the further closed material which had been put before him on behalf of the SSHD in February. We refer to this further in our closed judgment in these appeals. His approach was to consider the new material and then to consider all the material together, which he did in very considerable detail. His conclusion was that AE's rights under article 6 had not been infringed. He further concluded that there were reasonable grounds for suspecting that AE was or had been involved in terrorism-related activity.

80. Silber J discussed the principles governing the article 6 issue post the decision of the House of Lords in considerable detail between [21] and [52] of his second open judgment. At [33] to [39] he concluded that there is no minimal level or irreducible core of material which must be disclosed to the controlee. As we read them, his reasons were substantially the same as those which have led us to the same conclusion. At [40] to [43] he analysed the role played by the special advocates, both in a thorough cross-examination of the SSHD's principal witness and in detailed submissions. Then at [44] to [52] he gave his reasons for concluding that AE did not suffer serious injustice as a result of the system deployed, when viewed as a whole. We will return to the particular points which arise in AE's appeal below but, so far as the principles are concerned, since the principles adopted are substantially those which we have derived from the reasoning of the majority in *MB and AF*, we do not quarrel in any significant way from the way Silber J put them in *AE*.

The principles adopted by Mitting J in AN and by Stanley Burnton J in AF

81. In *AF* Stanley Burnton J essentially adopted the approach of Mitting J in *AN*. Unlike many of the other judges who have considered the relevant principles, including us, Mitting J expressed his views as to what was decided in *MB and AF* with admirable brevity and clarity. At [1] he set out the nature of the open case made against AN and at [2] he indicated that the SSHD was willing to provide some limited further material but not much. At [3] he said that for the reasons set out in a closed judgment he was satisfied that

> "i) AN has not had disclosed to him a substantial part of the grounds for suspecting that he has been involved in terrorism related activity and that, without further disclosure, he personally will not be in a position to meet those aspects of her case.
>
> ii) Disclosure of that material would be contrary to the public interest for one or more of the reasons identified in CPR Part 76.1(4)."

82. The issue was whether further disclosure was necessary in order to avoid infringing AN's right to a fair trial under article 6. At [5] Mitting J said that the principle established by *MB and AF* was clear, namely that the SSHD was not entitled to rely on material not disclosed to the controlee when to permit reliance upon it without disclosure would be incompatible with his right to a fair trial. That proposition is not of course in dispute, provided that 'fair' is given the meaning attributed to it in *MB and AF*: see our conclusion at [66i)] above. In the last sentence of [5] Mitting J said that the practical guidance given upon the application of the principle is a good deal less clear. That is indeed the problem that has faced all the judges (including us) who have considered this question.

83. At [6] to [8] Mitting J referred to some of the extracts from the speeches to which we referred earlier. It is of considerable interest that in the course of his [7], after referring to a number of passages in the speech of Baroness Hale, including those referable to Ouseley J's judgment in *AF*, he said this:

> "AF was a case in which the open material did not disclose to him grounds for reasonable suspicion. The only allegation made openly against him was that he had links to islamist extremists in Manchester, some of whom were affiliated to the LIFG: paragraph 42. It seems, therefore, that Lady Hale would, in an appropriate case, accept that reasonable grounds for suspicion formed on the basis of "better and more reliable sources of intelligence" could be formed and upheld without telling the controlled person more than the barest outline of the nature of the activities of which he was suspected. If that is the right test, the Secretary of State's third open statement satisfies it."

However, as we read his judgment, Mitting J did not conclude that that was the right test. At the end of [8] he said that he was satisfied that Mr Andrew Nicol QC, AN's special advocate, had conducted a skilful and rigorous examination of the closed case but did so without AN's instructions on the undisclosed material.

84. Mitting J then stated his conclusion derived from *MB and AF* as follows at [9]:

> "The conclusion which I draw from the four speeches of the majority in MB is that unless, at a minimum, the special advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them. In practice, this means that he must be told their gist. This means that, if he chooses to do so, he can give and call evidence about the issues himself."

85. In the first of the two open judgments of Stanley Burnton J in *AF* he does not, as we read his judgment, expressly choose between the principles adopted by Silber J and those adopted by Mitting J: see [13] to [37]. However, it is we think clear from his analysis of the facts in the first judgment and at [1] of his second judgment that he accepted the approach of Mitting J rather than that of Silber J.

86. We have reached the conclusion that there is, as is submitted on behalf of the SSHD, a substantial and important difference between the approach of Mitting and Stanley Burnton JJ and that of the majority in *MB and AF*. This appears from Mitting J's rejection of the possibility, which he accepted had been espoused by Baroness Hale, that reasonable grounds for suspicion formed on the basis of "better and more reliable sources of intelligence" could be formed and upheld without telling the controlled person more than the barest outline of the nature of the activities of which he was suspected. Since he accepted that, if that was the right test, the SSHD's third open statement in AN satisfied it, it appears to us that he must have been accepting the argument advanced on behalf of AN that there is a core irreducible minimum information that must be disclosed. As explained above, that proposition was in our opinion rejected by the majority in *MB and AF*, a conclusion which appears to us to be supported by his approach to the speech of Baroness Hale to which he refers in his [7] quoted above.

87. We will return, so far as necessary, to the particular issues in each case below and will consider the facts in our closed judgment but it is sufficient for the purposes of this part of the debate simply to say that none of the analyses of *MB and AF* which we have read has persuaded us to alter the conclusions summarised in [57] above. It appears to us somewhat different problems arise in the other case with which we are concerned, which is the decision of Sullivan J in AM.

88. Before leaving this part of the case we must refer to two further points. The first is the concern expressed by Mitting J in [10] of his judgment and the second is a general point about timing. As to the first, Mitting J said this in his [10]:

> "AN does not know the gist of significant grounds of suspicion raised against him. I have already determined, in a closed Judgment, that the material which I have considered is capable of founding reasonable grounds to suspect that he has been involved in terrorism related activity. I have identified in a closed disclosure judgment what must be disclosed to him to fulfil his right to a fair hearing in accordance with my understanding of the speeches of the majority in MB. I do so with disquiet, because the factors which require further disclosure in this case are likely to arise in many others, with the result that the non-derogating control order procedure may be rendered nugatory in a significant number of cases in which the grounds for suspecting that a controlled person has been involved in terrorism related activities may otherwise be adjudged reasonable."

Some of the judges with great experience in this field share this view and there is a concern that the House of Lords did not look at the closed material before giving guidance for the future. Mitting J's view is inconsistent with the expectation of the majority that on their approach article 6 will only be infringed in a minority of cases, perhaps a small minority: see in particular per Baroness Hale at [66], [68] and [73] and per Lord Brown at [90] referred to at [32] above. However, assuming (as we think we must) that the members of the appellate committee were alive both to the way the system works in practice and to the effects of the majority opinions, the effects spoken to by Mitting J suggest that he has interpreted the majority opinions in a less favourable way to the SSHD than the majority intended.

Timing

89. There was some debate at the hearing of the appeal as to when the decision whether or not the process in a particular case infringes article 6 should be made. Mitting J rejected a submission on behalf of the SSHD in *AN* that he should not put the SSHD to her election until the end of the process. In our opinion all depends upon the circumstances. As we have seen, the authorities show that the process must be considered as a whole, so that there will be cases in which justice requires that the decision be made at the end of it. Also, as Collins J said in *Re Bullivant*, the House of Lords contemplated an iterative process, as more and more information is produced to the controlee: see also Stanley Burnton J's first judgment in *AF* at [34] and [35]. In such a case it is important that the decision should not be made too soon. For example the kind of process referred to at [70] to [74] above may take some time. On

the other hand, if the position is clear, we can see no reason in principle why the decision should not be made at a comparatively early stage. The question when the decision is to be made is, as we see it, essentially a case management decision for the judge to take and thus a decision with which this court should be most reluctant to interfere. It is important to remember that the jurisdiction of this court is limited to correcting errors of law.

The application of the article 6 principles in each case

AE

90. We have already expressed our view that Silber J adopted the correct principles when considering the facts in *AE*. We have explained in our closed judgment in *AE* that we detect no error in principle on the part of Silber J in AE's case. In particular we note here that the exercise he adopted, which included a proper consideration of what difference further disclosure would have made, seems to us to support the conclusions of principle we have reached to the effect that such a consideration plays a proper part, according to the circumstances of the particular case, in answering the question whether there has been significant injustice to the controlee. It follows that, at any rate so far as this aspect of the case is concerned, AE's appeal must be dismissed.

AN

91. For the reasons already given, which are to some extent amplified in our closed judgment, it is our view that Mitting J misdirected himself in concluding that there was an irreducible minimum of material which must be disclosed to the controlee as a matter of law. For the reasons given in our closed judgment we have concluded that the matter should be remitted to Mitting J (if he is available) for reconsideration in the light of our judgment. Any such reconsideration should, however, await the outcome of any appeal to the House of Lords.

AF

92. Again, we conclude that Stanley Burnton J misdirected himself in the same way as Mitting J. We also conclude that his approach to the 'Lord Brown exception' was flawed. This was through no fault of his because it appears that the parties were arguing for what we have described as the radical exception to the principle of fairness, whereas we have concluded that Lord Brown was not relying upon any such radical exception. If Stanley Burnton J had been approaching the matter as we have suggested, he would not have divided the question up as he did. In these circumstances we have concluded, again subject to any appeal to the House of Lords, that the sensible course is to remit the matter to a judge for further consideration in the light of our judgment.

93. We should add that, as explained in our closed judgment, we are of the view that the majority of the House of Lords would ask the question what difference disclosure to the controlee of other material, which Stanley Burnton J did not rely upon in reaching his conclusion that the 'Lord Brown exception' was satisfied on the facts, would make. It will be for the judge considering the matter again to look at all the material together and ask himself or herself whether there has been significant injustice to AF.

94. To that extent we conclude that the appeal of the SSHD should be allowed. In these circumstances it is not necessary for us to rule separately on AF's appeal against Stanley Burnton J's view that the 'Lord Brown exception' was satisfied on the facts. We explain in our closed judgment how we think the matter should be dealt with.

AM

95. Sullivan J only delivered a closed judgment, which we have considered in our own closed judgment. We detect no error of principle in that judgment so far as the approach to article 6 is concerned, or at all. It follows that the SSHD's appeal must be dismissed.

Particular issues

AE

96. The remaining issues are discrete questions which arise only in the case of AE. It was submitted to Silber J and has been submitted to us that the control order to which AE was subject at the time the matter came before him amounted to a deprivation of liberty contrary to article 5 of the Convention (and thus unlawful because such an order cannot be made as a non-derogating control order) and, in any event, that a 16 hour curfew was (and is) not necessary or proportionate.

97. The history of the control orders is set out by Silber J at [3-5] of his first open judgment and at [4-5] of his second open judgment. It is briefly as follows. The first control order was served on AE on 18 May 2006. It provided for a curfew of 18 hours and a number of tight restrictions including a prohibition on unauthorised visitors at all times. They were very similar provisions to those which were later held to be unlawful as amounting to a deprivation of liberty by Sullivan in *JJ* [2006] EWHC 1623 (Admin) in a judgment which was upheld by this court: see [2007] QB 446. The SSHD then revoked that order and made a second order on 11 September 2006, which Silber J described as 'the 2006 control order'. Under that order the curfew was reduced to 14 hours and restricted the prohibition on unauthorised visitors to the hours of curfew. Various issues came before Silber J arising out of that order. However, they were adjourned pending the decisions of the House of Lords in *MB and AF*, *JJ* and *E*.

98. The SSHD made a further order in September 2007 ('the 2007 control order') and subsequently made modifications to it on 31 October ('the 31 October modifications'). The key modifications for present purposes were those increasing the curfew from 14 to 16 hours and extending the prohibition on unauthorised visitors so that it applied not only to curfew hours but also to non-curfew hours. Two distinct questions were raised before the judge. The first was whether the 31 October modifications were compliant with AE's rights under article 5 of the Convention. If they were not, the orders would be unlawful because no attempt had been made to derogate from the Convention. The second question was whether the modifications were "necessary for purposes connected with protecting members of the public from terrorism". This is a necessary requirement of a non-derogating control order under section 2(1)(b) of the PTA 2005 quoted in [5] above. These questions were considered by Silber J both at [70] to [104] of his second open judgment and in his second closed judgment. He answered both questions in the affirmative. It is

submitted on AE's behalf that both his answers were wrong. Since the questions are distinct, we consider them separately.

Deprivation of liberty

99. Silber J discussed the decision of the House of Lords in *JJ* and the relevant principles at [77] to [96] of his second open judgment. In short the position is as follows. In *JJ* the majority thought that, in the context of that case, a curfew of 18 hours amounted to a deprivation of liberty contrary to article 5. Lord Hoffmann and Lord Carswell, who both dissented, thought that it did not. For his part Lord Carswell made it clear at [84] that what length of curfew would amount to a deprivation of liberty would depend upon what he called the overall matrix of the given case. The majority comprised Lord Bingham, Baroness Hale and Lord Brown. Lord Bingham and Baroness Hale took the view that a 14 hour curfew did not amount to a deprivation of liberty but an 18 hour curfew did. They did not express a view as to where the dividing line ought to be drawn, no doubt because it is difficult or impossible to do so if all depends upon the circumstances of the particular case.

100. Lord Brown also took the view that an 18 hour curfew did amount to a deprivation of liberty. He discussed this particular problem at [102] to [109]. He thought that some guidance was appropriate: see in particular [105], [106] and [108]. In [108], after referring to the reluctance of other members of the appellate committee to give guidance, he said this:

> "Just so that there is no mistake about it, my view is that, taking account of the conditions and circumstances in all these various control order cases, provided the "core element of confinement" does not exceed sixteen hours a day, it is "insufficiently stringent" as a matter of law to effect a deprivation of liberty. Beyond sixteen hours, however, liberty is lost."

101. At [80] Silber J accepted the submission on behalf of the SSHD that three out of the five members of the committee accepted that in principle a 16 hour curfew did not necessarily infringe the controlee's rights under article 5. However, at [82] and [83] he also accepted Mr Davies' submission on behalf of AE that, in the light of Lord Carswell's focus on the importance of the factual matrix and Baroness Hale's reference in [63] to the fact that situations may be "many and various", the appellate committee was not saying that a curfew of 16 hours will never amount to a deprivation of liberty.

102. In these circumstances we accept Mr Sales' submission that Silber J did not misdirect himself by focusing only on the period of curfew. He took into account all the circumstances of the case in concluding that there was here no deprivation of liberty. We detect no error of law or principle in his approach such as would justify this court in interfering with his conclusion that AE's rights under article 5 were not infringed.

Necessity

103. Silber J considered the question whether the control orders and the conditions attached to them, including the October modifications were necessary and, indeed,

proportionate for purposes connected with protecting members of the public from the risk of terrorism. He correctly directed himself that the court must give intense scrutiny to the necessity for each of the obligations imposed under the control order: see in particular [91], where he set out the principles identified by this court in *MB* at [64] and [65]. He concluded that the orders and conditions, including the modifications were necessary, provided that the prohibition on authorised visitors was limited to the period of the curfew. He gave his reasons in both his second open judgment and his second closed judgment. We detect no error of principle in either such as to justify this court in interfering with his conclusion on necessity or proportionality. It follows that we dismiss AE's appeal under this head.

CONCLUSIONS

104. For the reasons we have given, the results of these appeals are that the appeal of AE is dismissed, while the appeals of the SSHD are allowed in the cases of AN and AF but dismissed in the case of AM. The cases of AN and AF are remitted to a judge for reconsideration in the light of this judgment. We think it desirable that AN should be remitted to Mitting J if he is available and, if he is not, to another judge. However, if there is to be an appeal to the House of Lords (see below), no such remission should take effect until the appeal is determined.

Postscript

105. This court rarely gives permission to appeal to the House of Lords. However, the approach to be adopted to hearings under section 3(10) where the SSHD seeks to avoid open disclosure of relevant material to a controlee under a non-derogating control order is a matter of general public importance. While we have tried to interpret the views of the majority in *MB and AF*, there is undoubtedly scope for argument on the question whether our interpretation is correct. While we will consider submissions to the contrary, we have concluded that it would be in the public interest to give permission to appeal to the House of Lords in *AE*, *AF* and *AN* on all article 6 related issues but not otherwise. As at present advised, we do not, however, think that the same applies to *AM*.

106. All members of the court would like to thank counsel for their assistance in this case, which we have found far from straightforward.

Sedley LJ:

107. In *MB and AF* the House of Lords had to decide whether the provision of a special advocate was an adequate safeguard for an individual whose freedom was at risk from a control order based in significant part on closed material. The majority (Lady Hale, Lord Carswell and Lord Brown) considered that it could be, but not that it necessarily would be. Lord Brown, at [91], was perfectly clear that if in any one case a fair hearing and terrorism control became irreconcilable with one another, the former was not to be sacrificed on the altar of the latter. No member of the House expressed a contrary view, and Lord Bingham (at [34]) stated his understanding that this was the Committee's common position.

108. Lord Hoffmann took the view that the demands of fairness would always be satisfied by a special advocate; but, although his stance (which had also been this court's)

would have avoided the need to advance any further towards the coming impasse, no other member of the House adopted it. The wall at the end of the impasse was the case which could not proceed because none of the evidence on which it was based could be disclosed for good reasons of national security. In the cases before the House, it was held to be a question of balance; but although Lord Carswell appears to have considered that it would be a question of balance in every case, Lord Brown recognised that, where all the material was closed material, it would be a question not of balance but of choice: is the case to proceed or is it not? Only Lord Hoffmann's refusal to embark on the road at all was going to avoid this problem.

109. It was in search of an escape from the impasse that Lord Brown speculated in [90] (quoted above) that there might be an exception to the exception in cases where the judge was quite sure that the evidence, although of such sensitivity as to deny the controlee any access to the case against him, was unanswerable. Neither he nor the House laid down any proposition of law to that effect; and for reasons I will give I consider, with respect, that any such doctrine would be untenable. Lady Hale and Lord Carswell sought to meet the undoubted difficulty by stressing how flexible the concept of fairness is within the statutory framework; not – as has been urged on us by counsel for the Home Secretary - by silently adopting Lord Brown's speculation and giving it the force of law.

110. The majority of this court finds no such doctrine in *MB*, and to this extent I respectfully agree with them. Indeed I am dismayed that the argument should even have been thought viable. Dealing with the class of case where no disclosure at all is possible, the main clause of the single sentence in Lord Brown's opinion which has prompted this argument reads: "he [the judge] would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect". The conditional clause which introduces it speculates, without purporting to decide, that there might be an exception where the judge was nevertheless quite sure that the material was unanswerable. What has set the present hare running is Lord Brown's parenthetic suggestion that such an exercise is difficult but not impossible.

111. To suggest that the highest court of this country has by two concurring opinions, neither of which purports to do so, given the force of law to what is clearly a third member's aside is to go beyond even divination. Unless and until the new Supreme Court changes the mode of giving judgment, lower courts and lawyers ought in my respectful view to be able to assume that when their Lordships, or a majority of them, intend to make new law, they say so.

112. The issue is accordingly, in my judgment, free of authority. The question for this court is whether, in a case such as *AF*, where the judge took the view that he could be sure that the evidence, albeit wholly undisclosed, was unanswerable, the law regards the requirements of a fair hearing as satisfied. In my judgment, for reasons both principled and pragmatic, Stanley Burnton J and Mitting J were right to hold that the law did not do so.

113. Far from being difficult, as Lord Brown tentatively suggested it was, it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction,

having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.

114. This is why Megarry J's celebrated dictum in *John v Rees* about the fallibility of judgment based on partial evidence matters so much. Judges are not proof against the human delusion that one has heard enough to be sure that there is no answer. They have to guard themselves against it, and the way in which the law ensures they do so – not only the common law but all the systems governed by the European Convention on Human Rights and many others beside – is to insist, not that everything must be known before judgment is given, but that everyone affected must have had a proper chance (which they may of course forfeit) to advance as much material as may help the tribunal in reaching a judicious conclusion. No member of the House in *MB* suggested otherwise. If neither disclosure nor gist can enable the controlee to exercise this right, he is not getting a fair hearing because, however sure the court may feel on the material his accuser has placed before it, it simply cannot know whether there is a tenable answer, and the special advocate in the nature of things cannot tell them. The recent judgment of the ECJ in *Kadi v Council of the European Union* (3 September 2008) reiterates this principle, and it is rightly not suggested that a special advocate can always be depended on to fill the fairness gap.

115. For these reasons it seems to me that a doctrine that an otherwise unfair hearing will become fair if the material which the party affected has had no opportunity to answer is sufficiently convincing is pragmatically unsustainable. It is also constitutionally subversive because, as it seems to me, it negates the judicial function which is crucial to the control order system. The introduction of a hearing before a High Court judge to decide whether reasonable grounds for suspicion exist was Parliament's recognition that Lord Atkin's principled dissent in *Liversidge v Anderson* [1942] AC 206 was correct (as the courts themselves had since acknowledged: see *R v IRC ex parte Rossminster Ltd* [1980] AC 952, per Lord Diplock), because even in time of national emergency the fiat of the executive was an unacceptable basis for interfering with individual liberty. Lord Denning in his memoirs had described how the Regulation 18B system worked when he served during the war as regional legal adviser to the Home Office:

> "Most of my work in Leeds was to detain people under Regulation 18B. We detained people, without trial, on suspicion that they were a danger. The military authorities used to receive – or collect – information about any person who was suspected. If it was proper for investigation, I used to see the person – and ask him questions – so as to judge for myself if the suspicion was justified. He could not be represented by

> lawyers. …This power was discretionary. It could not be questioned in the Courts. It was so held by the House in *Liversidge v Anderson*. But Lord Atkin gave a famous dissent – after my own heart – in which he said: "In this country, amid the clash of arms, the laws are not silent…".' (The Family Story, p.130)

116. To emaciate the judicial function in the way that was proposed would be to move us back towards the unbridled executive power over personal liberty which Parliament – absent derogation – has clearly been seeking to avoid; and the courts for their part have no interest in pushing the executive towards derogation as an escape from legal oversight. The exception for which the Home Secretary contends would have the ironic effect that while the guilty would find it relatively easy to work out what it is that they need to explain away, the innocent will remain completely baffled and face an adverse finding without a fair hearing.

117. I make these observations not by way of dissent, since the other members of the court have not held the 'Lord Brown exception' to be law, but to make it clear why I consider that the argument that it is (or should be) the law is dangerous and wrong.

118. There is nothing in the nature of a control order, with its potentially devastating effect on the life of the individual affected and his family, which calls for less than the maximum judicial oversight before it is confirmed. Nor, it seems to me, is the necessary rigour diluted by the fact that what has to be established is only that there are reasonable grounds to suspect involvement in terrorist-related activity. It is perfectly true that reasonable grounds to suspect something can coexist, at least in theory, with proof of the contrary. But facts have to be proved before they can found suspicion; and if a convincing explanation is offered of such facts as are proved the suspicion may cease to be reasonable.

119. As I understand it, *MB* decides (see especially [34], [43], [44], per Lord Bingham) that a complete withholding of the grounds for suspicion makes a fair hearing impossible. I regret that I am unable to follow the Master of the Rolls and the Vice-President ([36]ff) along their route, which differs from that charted by counsel for the Home Secretary, to a contrary conclusion. It is not easy, and might even be thought hazardous given that the case is now almost certain to return to their Lordships' House, to spell out in unitary form (see [64]) what has been differently – and not always compatibly - expressed in four distinct opinions. For myself, I am not at all sure that Baroness Hale's phrase ([74]) "even though the whole evidential basis … is not disclosed" is intended to mean "even though none of the evidential basis is disclosed". As I understand her, she means "even though not all of the evidential basis is disclosed". In any event, Lord Carswell does not adopt such a formulation, and Lord Brown at [91] (subject to his mooted exception) rejects it. It should take a great deal more than this to call Lord Bingham's understanding of his Committee's collective view in question.

120. Nor am I able, with respect, to adopt the view of the Master of the Rolls and the Vice-President as a freestanding doctrine. It appears (see [64](iv)) to reject the notion that there is an irreducible minimum of disclosure without which a control order case cannot proceed, when the House, as I understand *MB*, has held otherwise. And it appears (see [64](vi)) to come close to adopting the 'Lord Brown exception' which it

has earlier, and in my respectful judgment rightly, rejected. Since, however, the issue is once more destined for the House, to say more would be superfluous.

121. It follows that Silber J, in holding that enough had now been disclosed to AE to afford him a fair hearing, set the bar too low. I would allow AE's appeal to the extent of remitting it for redetermination on the correct principle. By the same token I would not overset the judgments of Mitting J in *AN*, of Stanley Burnton J in *AF* or of Sullivan J in *AM*. The former two reached reasoned conclusions on the quality of the disclosed material which in my judgment are untainted by any error of law, and we are agreed, at all events, that there is no reason to interfere with the closed judgment of Sullivan J in AM's case.