Neutral Citation Number: [2009] EWCA Civ 287

Case Nos: C4/2008/2747, 2748
2749, 2750, 2751 and 3036

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 Blake
CO/4391/07, CO/1076/08, CO/9703/07,
CO/8598/08, CIO/8357/07 and CO/5651/06

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2009

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE JACOB
and
LORD JUSTICE MAURICE KAY

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant/ Defendant**
- and -	
AHK, GA, AS, MH, FT and NT	**Respondents/ Claimants**
and between	
FM	**Appellant/ Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Defendant**

- -
- -

Lisa Giovannetti, Charles Bourne and Kate Grange (instructed by the **Treasury Solicitor**) for the **Secretary of State**
Amanda Weston (instructed by **Bates Wells and Braithwaite**) for **AHK**,
Sanjay Lal (instructed by **Dotcom**) for **GA**
Stephanie Harrison (instructed by **Tyndallwoods**) for **AS** and **AH**
Manjit Gill QC and **Danny Bazini** (instructed by **Trott and Gentry**) for **FT** and **NT**
Rambert de Mello and **Tony Muman** (instructed by **AS Law)** for **FM**

Hearing dates: 17 and 18 February 2009

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Judgment

Sir Anthony Clarke MR:

This is the judgment of the court.

Introduction

1. These appeals raise a narrow procedural question as to how the court should approach applications for judicial review of refusals by the Secretary of State for the Home Department ('the Secretary of State') of applications for British nationality (or citizenship) on the ground that the applicant has not demonstrated good character in circumstances in which the Secretary of State is not willing to disclose relevant material to the applicants on public interest grounds. The question is in what (if any) circumstances the judge should consider the documents before deciding whether or not to invite the Attorney General to appoint a special advocate to assist the court.

2. The appeal is from an order made on 31 October 2008 in which Blake J ('the judge') invited the Attorney General to appoint special advocates to represent nine claimants in judicial review proceedings. He also invited the Attorney General to consider whether one or two special advocates might represent the interests of all nine claimants rather than each claimant having a special advocate of his own. The nine claimants were AHK, BM, GA, ZG, AS, MH, IG, FT and NT. We note in passing that the Attorney General has indicated a willingness to appoint special advocates as requested by the judge. The judge granted the Secretary of State permission to appeal in all nine cases but stayed the appeals in the cases of BM, IG and ZG until the determination of the other appeals. The Secretary of State's appeal is therefore limited to the cases of AHK, GA, AS, MH, FT and NT. In the same order the judge declined to invite the Attorney General to appoint special advocates in the cases of AM and FM. He granted AM and FM permission to appeal but stayed AM's appeal pending the outcome of FM's appeal. The judge gave further directions, although he stayed them pending the decisions in these appeals. All the claimants now have permission to apply for judicial review. In some cases permission had been granted before the matter came before the judge, whereas in the remaining cases the judge himself granted permission.

Background

3. All the claimants came to this country as refugees and have indefinite leave to remain as refugees. They have all been refused British citizenship on the sole ground that the Secretary of State is not satisfied that they are of "good character" as required by section 6 and Schedule 1 of the British Nationality Act 1981 ('the BNA'). Attached to this judgment as Annex A is a schedule which summarises both the stated reasons for that refusal and the immigration status of the claimant in each case, except FM.

4. The position of FM is this. The decision letter refusing citizenship was dated 12 July 2006. The ground of refusal given was that the Secretary of State was not satisfied that FM was of good character because he had preached extreme Muslim views. In a letter dated 5 October 2006 upholding that decision the Secretary of State said that she was not prepared to elaborate further. However, there followed some correspondence between the parties, which included a letter of 28 February 2007 which asserted that FM had "openly preached anti-western views and voiced sympathy with Usama Bin Laden at the Hatherley Street Mosque in Liverpool". The acknowledgment of service

was dated 9 July 2007. It included reference to a letter dated 20 March 2007 from FM to his solicitor in which he said that he had never voiced any kind of sympathy with Usama Bin Laden and indeed that he had never mentioned Usama Bin Laden in any of his sermons or anything else whilst being in Hatherley Street Mosque. Lloyd Jones J refused permission to apply for judicial review on paper on 30 August 2007 but it was granted by Sullivan J after an oral hearing on 26 February 2008.

5. Since December 2004, the Secretary of State, through the UK Border Agency ('the UKBA'), has refused 138 applications for naturalisation on the basis of what Mr Philip Larkin of the UKBA calls restricted grounds. Of those, 35 were refused in 2008 and seven before 12 February in 2009. The Secretary of State is currently defending 22 applications for judicial review of such decisions. Similar procedural problems arise in each of these cases and all the cases which are not the subject of these appeals have been stayed pending our decision. Of the 138 cases since December 2004, 125 applications were refused on grounds which involved national security considerations, either wholly or in part. The remainder involved other public interest considerations, such as the protection of ongoing police investigations. In order to put the problem we are considering in context it is perhaps important to note that about 100,000 applications are successful every year.

6. In all the cases with which the judge was concerned the Secretary of State refused either to give full (or any) reasons or to disclose relevant material, including material she took into account in reaching her decision, or both. Because of the similarity of the issues likely to be raised in them, Collins J ordered that there be a directions hearing so as to determine how any application by the claimants for reasons or more reasons or by the Secretary of State for an order permitting her not to disclose such material should be approached. All parties welcomed Collins J's order.

The BNA

7. Sections 6(1) and 6(2) provide:

> "(1) If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.
>
> (2) If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen [or is the civil partner of a British citizen], the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.

Paragraph 3 of Schedule 1 provides:

> "Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it –
>
> (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and
>
> (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and
>
> (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and
>
> (d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and
>
> (e) the requirements specified in paragraph 1(1)(b), (c) and (ca)."

The requirements of paragraph 1(1)(b), (c) and (ca) are as follows:

> "(b) that he is of good character; and
>
> (c) that he has a sufficient knowledge of the English, Welsh or Scottish Gaelic language; and
>
> (ca) that he has sufficient knowledge about life in the United Kingdom…"

Unlike the position as to the other express requirements of paragraph 1(1), the Secretary of State has no express power to dispense with the requirement of good character: see paragraph 2 of Schedule 1.

8. Until its repeal by the Nationality, Immigration and Asylum Act 2002, with effect from 7 November 2002, section 44(2) of the BNA provided:

> "The Secretary of State … shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the Secretary of State on any such application shall not be subject to appeal to, or review in, any court."

The repeal of that section was subsequent to the decision of this court in *R v SSHD ex parte Fayed (No 1)* [1998] 1 WLR 763.

9. There is no statutory definition of 'good character' in the BNA and no relevant statutory guidance. The Secretary of State has however provided guidance to her officers as to the application of the test: see Annex D to Chapter 18 of the Nationality Instructions. That guidance includes factors which are said to lead the Secretary of State "normally [to] accept that the applicant is of good character, namely where :

- enquiries of other government departments and agencies are clear;
- there are no unspent convictions;
- there is no information on file to cast serious doubts on the applicant's character; and
- … there is written confirmation from HM Revenue and Customs that business affairs are in order."

10. The judge correctly held at [41] that no-one has the right to British citizenship, only to have his claim considered fairly under the scheme. It is, however, common ground that the decision to refuse citizenship can be challenged by judicial review. The legal burden of establishing good character is on the applicant, as is the burden of showing that the decision of the Secretary of State is wrong in law. However, there may be circumstances in which the evidential burden shifts to the Secretary of State. All will depend upon the circumstances. It is important to have in mind that there is no right of appeal against a refusal by the Secretary of State. In order to succeed the claimant must show that the decision was legally flawed.

The issues

11. In her detailed grounds of defence, which were before the judge, the Secretary of State proposed that, in any case where she objects to the disclosure of further information on the ground that it would be contrary to the public interest, and the court is considering an application for permission to apply for judicial review:

i) the Secretary of State should provide to the court, but not to the claimant or his legal representatives, a public interest immunity ('PII') certificate explaining the reasons why disclosure of the material would be contrary to the public interest, together with the sensitive material relied upon by the Secretary of State when making her decision;

ii) if the court considers it necessary to enable it to determine the application expeditiously and fairly, a closed hearing should then take place in order for the judge: (1) to hear and consider any further oral representations from the Secretary of State on the question of disclosure, (2) to "test and probe" the material/information that is laid before the court and (3) to decide what, if any, further procedural steps are necessary to ensure that the application can be determined expeditiously and fairly; in order to protect the public interest underlying the Secretary of State's objection, neither the claimant nor any interested party nor their legal representatives would appear at such a closed hearing and the hearing would not be in public.

It is important to note that, as we read them, those proposals appear to envisage a hearing at which the Secretary of State would be represented by counsel who would make submissions on behalf of the Secretary of State. In the Secretary of State's skeleton argument prepared for this appeal, in the context of testing and probing the material, reference was made to the decision of the Divisional Court in *Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin): see below.

12. The detailed grounds of defence set out further procedural steps proposed by the Secretary of State as follows:

i) Pre-permission:

a) in the light of the information before the court in the claim form and the Secretary of State's (open) acknowledgement of service and having considered the relevant (closed) information which had been considered by the Secretary of State in reaching her decision and made available to the court, the court should be in a position – without more – to decide whether the claimant has an arguable case that the decision of the Secretary of State was unlawful, especially, where, as here, any challenge to the substance of the decision of the Secretary of State could only be on *Wednesbury* grounds;

b) if such an arguable case is established, the court should grant permission to apply for judicial review; but if no such arguable case is established, permission to apply for judicial review should be refused.

ii) Post-permission:

a) it will be primarily for the court to ensure that information is not disclosed contrary to the public interest; cf CPR 31.19 and CPR 76.2(2) read with 76.1(4);

b) where the court has considered the closed material in accordance with the procedure identified above:

i) the court may direct – in so far as that is possible in the light of the public interest identified by the Secretary of State – that the Secretary of State disclose or summarise some or all of the closed material relied upon by the Secretary of State in reaching her decision;

ii) if, in light of the court's direction, the Secretary of State feels able to disclose or summarise sufficient of the closed material relied upon, the court should direct that the Secretary of State serve her detailed grounds of defence (including the information so disclosed or summarised) and proceed to an open oral hearing as provided for by CPR 54;

iii) however, if, despite the direction of the court, the Secretary of State does not feel able to disclose and/or summarise sufficient closed information to the claimant, any interested party and

their representatives without damage to the public interest, she shall not be required to make such disclosure or provide such summary but the court may consider asking the Attorney General to appoint a special advocate to represent the interests of the claimant in relation to any information not disclosed; but this power "should be exercised only in an exceptional case and as a last resort": see *Malik* at [99];

iv) where, as in this case, the court has not considered the closed material:

(a) the procedure set out in [11] and [12i)] above should be followed and

(b) where, in the light of all the information now before the court, no arguable case is made out, the court should indicate to the claimant that, subject to any further open submissions the claimant may wish to make, the court would be minded to dismiss the application for judicial review; or

(c) where an arguable case is made out, the court should proceed in accordance with [12b)(i) to (iii)] above.

13. The judge did not address those suggested principles in quite that way. That was no doubt in part because of the way the applications proceeded before him. While, as appears in Annex A and in [4] above, the Secretary of State had provided some explanation of her position, except in the case of AS, where she gave no reasons, she did not provide a PII certificate as suggested in [11i)] above. As already indicated and as shown in Annex A, permission had been granted in the cases of MH, FT and NT and refused in the case of GA and the application for permission had been adjourned in the case of AHK and not yet considered in AS. The judge himself gave permission in the cases in which the application for permission had been refused or adjourned.

14. The skeleton argument for the Secretary of State, which was prepared for this appeal by Miss Lisa Giovannetti's predecessor, identified these features as important:

i) Prior to making any decision about the future conduct of the case, including the appointment of a special advocate, the court should:

a) consider the PII certificate together with a copy of the sensitive material she relied upon; and

b) if necessary, hear oral submissions from the Secretary of State on the question of disclosure and/or test the material before the court.

ii) Whilst it was recognised that there might be circumstances at any stage of the judicial review process where the court would request the appointment of a special advocate, such a request would only be made:

a) in an exceptional case and as a last resort; and

b) in circumstances where the Secretary of State was unable to disclose or summarise sufficient material, consistent with common law fairness, without damage to the public interest.

15. Although the skeleton arguments range far and wide, as we read them the essential point which divided the parties in them was the insistence of the Secretary of State that the court should not appoint a special advocate until it had first considered the closed material and decided that there was no alternative. The argument for the claimants was that the claimants are in principle entitled to know the case and evidence against them and that there should be few, if any, exceptions. The primary case of some at least of the claimants was that the only exception is where the public interest requires that material (or reasons) cannot be made available to the claimants and where in those circumstances a special advocate is appointed on behalf of the claimant in order to see whether further information should be obtained, whether further reasons or a gist of the Secretary of State's case could be given to the claimant and whether any relevant witness should be asked to attend for cross-examination. In the alternative it was said on behalf of the claimants that a special advocate should almost always be appointed and that the cases in which the judge should consider the documents without the assistance of a special advocate should be very few and far between.

16. At the hearing, the position of the Secretary of State to some extent shifted. Miss Giovanetti formulated the test somewhat differently. She submitted that a special advocate should only be appointed to assist the judge when it was necessary to do so. When asked whether a judge should hold that such assistance was necessary when it was desirable, she was inclined to accept that that was so. However, she adhered to the position that it will ordinarily be appropriate for the judge to consider the documents for himself or herself without the assistance of a special advocate.

The general principle and special advocates

17. There is a fundamental general principle that a party to litigation is entitled to be given full reasons for a decision and to see all the material which the decision maker has available, including, in the present context, all the material which the decision-maker relied upon in making her decision and all the material which she now relies upon against the claimant in supporting her decision. It is also a fundamental principle that a judge should not look at material that the parties before him have not seen. These general principles are common ground and are often expressed in ringing tones: see eg *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, per Lord Bingham at [15] to [17] and the cases there cited.

18. The principles apply to all proceedings, including claims for judicial review. CPR 54.14(1) provides that anyone wishing to contest such a claim must file and serve on the claimant detailed grounds for contesting the claim or for supporting the decision impugned on additional grounds together with written evidence in support. In *R v Lancashire CC ex p Huddleston* [1986] 2 All ER 941 Sir John Donaldson MR described that obligation at page 945 as a "duty to make full and fair disclosure". In *Fayed (No 1)* Lord Woolf MR said that the obligation of the respondent public body in its evidence is to make frank disclosure to the court of the decision-making process.

19. It is however also common ground that there are exceptions to that principle. There is a general exception in the case of disclosure in CPR 31.19, which provides as follows:

> "(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.
>
> (2) Unless the court orders otherwise, an order of the court under paragraph (1) -
>
> (a) must not be served on any other person; and
>
> (b) must not be open to inspection by any person.
>
> (3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document, must state in writing -
>
> (a) that he has such a right or duty; and
>
> (b) the grounds on which he claims that right or duty.
>
> (4) The statement referred to in paragraph (3) must be made -
>
> (a) in the list in which the document is disclosed; or
>
> (b) if there is no list, to the person wishing to inspect the document.
>
> (5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.
>
> (6) For the purpose of deciding an application under paragraph (1) (application to withhold disclosure) or paragraph (3) (claim to withhold inspection) the court may -
>
> (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court; and
>
> (b) invite any person, whether or not a party, to make representations.
>
> (7) An application under paragraph (1) or paragraph (5) must be supported by evidence.
>
> (8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest."

20. There is no suggestion that in such a case it is necessary or appropriate to instruct a special advocate on an application under that rule. It follows that the CPR contemplate the court looking at documents produced by only one side, although it is fair to say that this is only in the context of disclosure and not in the context of a document upon which reliance is placed. It may also be added that a judge who looks at particular documents for interlocutory purposes may think it right not to take part in a determination of the merits. All no doubt depends upon the circumstances. The cases to which we refer below show that the courts have contemplated a number of circumstances in which the correct course is to ask the judge to look at documents, rather than to ask for the appointment of one or more special advocates.

21. There are now a number of statutory provisions which expressly provide for the appointment of a special advocate in different contexts and there are also a number of other circumstances in which it has been held that special advocates can be appointed in the interests of justice without the need for statutory authority: see eg *Malik* at [96] and [97] quoted below. In such cases, the correct approach is to invite the court to ask the Attorney General to do so. The cases do not explore the circumstances in which the Attorney General might decline to do so or in which such a decision might be challenged and on what basis. As we have already indicated, that problem does not arise here because the Attorney General has indicated a willingness to accept the judge's invitation. We would only comment in passing that, except perhaps in exceptional circumstances, we would expect the Attorney General to comply with the court's request, just as she ordinarily complies with a court's request to appoint an *amicus curiae* (or friend of the court).

22. A recent summary of the position is set out in the judgment of Dyson LJ, giving the judgment of the Divisional Court, which also comprised Pitchford and Ouseley JJ, in *Malik* at [94] to [102] as follows:

> "94. Mr Eadie [counsel for the claimant] submits that it is clear from the judgment that material, apparently decisive of the outcome of the application for the production order, was not seen by the claimant or his legal representatives. We have read the closed documentation carefully and can confirm that it does contain material which had an important bearing on the outcome of the application before the judge and that the judge was right so to regard it. Mr Eadie submits that the common law requirements of natural justice were not satisfied by the procedure that was adopted in this case. It is fundamental to a judicial inquiry that a person must have the right to see all the information that is put before the judge, so that he may comment on it, challenge it and, if necessary, counter it by contrary evidence. In addition, Mr Eadie submits that the claimant's article 6 civil rights were engaged by the Chief Constable's application and the procedure adopted did not afford the claimant a substantial measure of procedural justice as required by the Convention. At the very least, a special advocate was

required to view the closed material and attend the closed hearing in order to cross-examine Detective Inspector Richardson and make submissions to the judge.

95. Mr Eadie further submits that the need for a special advocate was heightened on the facts of this case by the seriousness of the consequences for the claimant if a production order was made. If he complies with the order, he runs all the risks to which we have earlier referred. If he does not comply, then he commits a contempt of court.

96. The use of special advocates was first sanctioned by Parliament in the context of national security deportations by the creation of the Special Immigration Appeals Commission ("SIAC") to hear immigration appeals in matters with a national security element: see section 2 of the Special Immigration Appeals Commission Act 1997. The functions of a special advocate in that context are set out in rule 35 of the Special Immigration Appeals Commission Rules SI 2003 No 1034 (as amended). A special advocate in SIAC proceedings has, broadly speaking, two principal tasks: (i) to test the Secretary of State's objections to disclosure of material to the appellant and see whether more can be moved from the closed to the open part of the proceedings; and (ii) to represent the interests of the appellant in any closed proceedings. Once a special advocate has received closed material, his ability to communicate with the appellant or his representatives is severely curtailed (rule 36). The SIAC model has been adopted in various other legislative contexts. It is not necessary to describe these. They do not include applications for production orders under the 2000 Act.

97. There have been cases where, without an applicable statutory scheme, the court has asked the Attorney-General for a special advocate. Examples are *Secretary of State for the Home Department v Rehman* in the Court of Appeal at [2003] UKHL 47 at [31] and [32]; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 at [34]; *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [22] (in the context of an ordinary criminal trial); and *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.

98. In *R v H* at [22], Lord Bingham, giving the opinion of the Appellate Committee of the House of Lords said, in the context of a discussion about criminal trials, that

the court should not be deterred from requesting the appointment of a special advocate to represent a defendant in public interest immunity matters, where the interests of justice are shown to require it. He said: "But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort". In *R (Murungaru) v Secretary of State for the Home Department* [2006] EWHC 3726 (Admin), Mitting J drew attention to the fact that Lord Bingham's comments were made in the context of criminal procedure. That is true, but we doubt whether the court should be more willing to request the appointment of a special advocate in other contexts. In *R (Roberts) v Parole Board*, (not in the context of a criminal trial), it is to be noted that Lord Carswell said at [144] that the special advocate procedure should be used only in "rare and exceptional cases" and as a course of last and never first resort. And Lord Woolf CJ said at [42] that what Lord Bingham said in *R v H* "could be even more apposite in the case of the [parole] board.

99. We accept, therefore, that there is power in the court to request the appointment of a special advocate of its own motion. But that power should be exercised only in an exceptional case and as a last resort.

100. In deciding whether to request the Attorney-General to appoint a special advocate, the court should have regard to the seriousness of the issue that the court has to determine. We accept that the consequences for the claimant of an order that requires him to disclose his sources (other than Hassan Butt) are very serious for him. But as against that, the entitlement to disclosure of relevant evidence is not an absolute right. One important competing interest which may justify non-disclosure is national security: see *Botmeh and Alami v UK* (Application No 15187/03 (unreported)) at [37] cited by Baroness Hale of Richmond in *Secretary of State for the Home Department v MB* [2007] 3 WLR 681 at [62].

101. As Mr Nicol points out, even in a procedure which is entirely *ex parte*, the court may consider that the absent party is afforded a sufficient measure of procedural protection by the obligation on the party who is present to lay before the court any material that undermines or qualifies his case or which would assist the absent party. Further, the court itself can be expected to perform a role of testing and probing the

> case which is presented. All these features may satisfy the court that the procedure is fair and complies with article 6, even without a special advocate. We would wish to place particular emphasis on the duty of the court to test and probe the material that is laid before it in the absence of the person who is affected. Judges who conduct criminal trials routinely perform this role when they hold public interest immunity hearings.
>
> 102. A further relevant question is the extent to which a special advocate is likely to be able to further the absent party's case before the court. It may not always be possible for the court to form a view as to how far, realistically, a special advocate is likely to be able to advance the party's case. But sometimes, it is possible. If the court concludes that the special advocate is unlikely to be able to make a significant contribution to the party's case, that is a relevant factor for the court to weigh in the balance. It should always, however, be borne in mind that it is exceptional to appoint a special advocate outside an applicable statutory scheme."

23. As counsel for the claimants have pointed out, in our judgment correctly, *Malik* was a very different case from this. The court took the view that a special advocate was likely to be of very little assistance. In these circumstances there is no advantage in discussing the facts of that case in any detail. We would however note that Dyson LJ said at [105] that it was true that a special advocate could "test and probe the evidence and assessments of the officer, but so too could the judge". It was a case in which counsel for the claimant had not asked for a special advocate and the court held, *obiter*, that it was far from persuaded that the judge would have been in error in not asking for a special advocate of his own motion.

24. In *Murungaru v SSHD* [2008] EWCA Civ 1015 this court quashed a request for a special advocate. In the course of his judgment, with which Jacob LJ agreed, Sedley LJ made some general, but we think for the most part *obiter*, observations on the topic of special advocates: see [13] to [24], where he referred to *Chahal v UK* (1996) 23 EHRR 413, *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, *Scott v Scott* [1913] AC 417 and *Roberts*. For example he noted at [15] that the Grand Chamber in *Chahal* held, at [131] to [132], that in order to satisfy the article 5(4) due process guarantee in national security cases

> "there are techniques which can be employed which both accommodate legitimate security concerns … and yet accord the individual a substantial measure of procedural justice".

He added that the United Kingdom's then rudimentary procedures were held to fall short of this standard. We accept the submission made on behalf of the claimants that by 'techniques' the court had particularly in mind the use of special advocates.

25. Sedley LJ said at [20]:

> "Although they do not arise directly in the present case, there are some larger principles which need to be borne in mind by courts. The help of a special advocate is to be sought if, but only if, the interests of justice require it: it is a last resort if all other means of doing justice fail (see Lord Bingham in *R v H* [2004] 2 AC 134 §22). Even disclosure of evidence is not a universal right (see Lady Hale in *Home Secretary v MB* [2008] AC 440 §58ff). The availability of a special advocate can never be a reason for reducing the procedural protections which the law otherwise guarantees (see Lord Woolf in *Roberts v Parole Board* §59). These, whether under art. 6 or at common law, may vary with the gravity of the potential consequences of the proceedings (see Lord Bingham in *Home Secretary v MB* §24)."

Sedley LJ added at [21] that that summary reflected the views of the Divisional Court in *Malik* from which he quoted [101] and [102].

26. Sedley LJ also added at [22] that the question in *Malik* was whether the Crown Court judge had erred in not asking for a special advocate, the Divisional Court holding that he did not, whereas in *Murungaru* Mitting J's principal object in invoking the special advocate procedure was to have the fairest possible representation of the claimant's interests when the court came to examine the public interest justification advanced by the state under Article 1 Protocol 1 of European Convention of Human Rights ('the ECHR'). It was a case in which there was a PII certificate, of which Sedley LJ said:

> "Because of the certificate the court will have to evaluate the material for itself. Mitting J, a judge with very considerable experience in this problematical field, took the view that a special advocate would be of value to the court in this exercise – not because a special advocate can represent the claimant (they cannot and do not purport to) but because he or she can probe the material independently and relieve the judge of what might otherwise resemble a partisan intervention."

27. Sedley LJ added:

> "23. The last of these considerations may, however, be negotiable. In *Malik* the divisional court said:
>
> > "It is true that a special advocate could test and probe the assessments of the officer, but so too could the judge"
>
> While I recognise the factuality of this proposition, I would temper it with a need to gauge the risk that probing the material may draw the judge from the bench into the arena.
>
> 24. One notes, too, that the decision of Mitting J in the present case was before the divisional court in *Malik.*

> Noting that Mitting J had drawn attention to the fact that Lord Bingham's comments in *R v H* had been made in the context of criminal procedure, the court commented:
>
> > "That is true, but we doubt whether the court should be more willing to request the appointment of a special advocate in other contexts."

28. The facts of *Murungaru* were very different from both *Malik* and the instant cases. It was, however, an example of a case in which the court concluded that it was not necessary for a special advocate to be appointed and that the court should look at the documents. On the other hand, it is fair to observe that the court said that, if (as the judge had thought) questions of proportionality had arisen, it would have upheld his decision. All thus depends upon the circumstances of the particular case.

29. In the later case of *A,K,M,Q and G v HM Treasury* [2008] EWCA Civ 1187, this court, comprising Sir Anthony Clarke MR and Wilson and Sedley LJJ, held that there was no reason in principle why a special advocate could not be appointed in a particular case without statutory authority but that whether it should do so or not depended upon all the circumstances of the case: see at [78]. There was no argument about the relevant test and the court simply referred to *Malik* and said that the court should only ask the Attorney General to appoint a special advocate in an exceptional case and as a last resort. Sedley LJ wrote a judgment dissenting in part but not, we think, on this question of principle.

30. The claimants submitted that a special advocate should be appointed as a matter of course in cases of this kind because it is not appropriate for the judge to consider material for himself without anyone representing the interests of the claimant who is both permitted to see the documents and told the basis of the case against him. They said that there would otherwise be a risk that the judge would appear to enter the arena in favour of the Secretary of State and justice would not be seen to be done.

31. None of the cases or the statements in them go so far as to hold that the judge must never look at the documents but must always appoint a special advocate. On the contrary they proceed on the basis that it is only in an exceptional case and as a last resort that a special advocate should be appointed. In the course of the argument in this case we were in effect asked to revisit that test. We are of course bound by decisions of this court but, whatever the test, the cases do not support the proposition that a special advocate must always be appointed. Moreover, it is important to note that the judge did not go so far in this case. On the contrary, having stressed the value of special advocates, as he was well qualified to do, since he has considerable experience acting as a special advocate in different contexts, the judge expressed his conclusions thus at [68]:

> > "Second, in those cases and in cases 1 and 4, I consider for the reasons already given in this judgment that the court is likely to be assisted by the appointment of an SAA to examine, negotiate and if appropriate make submissions about whether further data can be disclosed without damage to the public

> interest. I am conscious that I have not seen the closed material and that there is much to commend the defendant's suggestion that whatever criteria the court adopts to decide when an SAA is needed, the court should examine the closed material for itself before deciding on whether an SAA is needed. As against that the directions hearing were designed to clarify whether an SAA should be appointed or not and further delay in reaching a conclusion on this issue should be avoided if possible. In the light of my conclusions that Convention rights are engaged, that the procedure should be as fair as possible and that there is a reasonable possibility on the present state of information that use of an SAA could result in disclosure of further data I consider it appropriate that I should make my request now to the Attorney General in this group of cases."

The judge thus did not accept the submission that a judge should never look at the closed material first before deciding whether to appoint a special advocate. On the contrary, he said that there was much to be said for doing so in these cases but, among other things, that to do so would cause delay.

32. In these circumstances we do not accept the submission that a special advocate should always be appointed and that the court should never look at the documents first. On the other hand, the essential duty of the court is to ensure that it acts fairly and, in particular, that the hearing is fair to the parties, including of course the claimants. In our judgment, that is so whether fairness is considered at common law or in accordance with the principles set out in the ECHR. There was much debate in the course of the argument as to whether article 6 of the ECHR applied, either directly, or as a result of the engagement of articles 8 or 11. See now the recent decision of the House of Lords in *RB (Algeria) v SSHD* [2009] UKHL 10, especially at [86], [90] to [91] and [168] to [179] where it was held that article 6 did not apply to the decision to make a deportation order. However, we do not think that it is necessary or appropriate for us to analyse the possible circumstances in which the ECHR might apply. That will depend upon the facts of particular cases. Whatever the position with regard to the decision of the Secretary of State, each claimant is entitled to a fair hearing of his application for judicial review. In this connection, the same principles of fairness should apply in every case, whether the ECHR applies or not. There may however be cases in which issues of proportionality arise, where it may be appropriate to appoint a special advocate in circumstances in which it would not otherwise be appropriate to do so, as was recognised at first instance in the very different factual context in *Murungaru*.

33. We accept the submission that the effects of a refusal of British nationality may be serious for the applicant. This has been accepted since *Fayed (No 1)*, where Phillips LJ said at page 787F-G:

> "The refusal of British nationality to one who has, apparently, satisfied all the technical requirements … is likely to carry the natural implication, both in this country and abroad, that he has attributes of background character and conduct that are disreputable. I consider that these factors give the applicants stronger grounds for urging a duty of disclosure … The refusal

> of the benefits of naturalisation and the adverse inferences that will be drawn from such refusal are so serious that, as a matter of natural justice, an applicant should not be visited with them without a fair chance to meet the adverse case that threatens that result."

There are undoubted benefits in British nationality. For example it brings with it the benefits of being a citizen of a member state of the European Union and entitles the citizen to vote and to stand for and, if elected, become a Member of Parliament. In her written submissions the Secretary of State says that she keeps her communications with the applicant confidential so that it is up to him or her to decide whether to make the refusal of citizenship public. We naturally accept that the Secretary of State respects that confidentiality but we do not think that it is realistic that the result of the application will not frequently become known.

34. The issues in particular cases may be different. In some, perhaps many, cases the issue may simply be whether the Secretary of State acted rationally, in which case, at any rate where she had available to her only little material, there may be no difficulty in resolving the issues arising in a claim for judicial review fairly. In other cases, the ECHR may apply and substantive issues of proportionality may have to be resolved. Different considerations may arise in such cases. These are factors which must be taken into account when the judge decides whether to request the appointment of a special advocate. It appears to us that the judge's conclusion that the ECHR is engaged was not made on a sufficiently case specific basis.

35. However, in order for us to determine these appeals it is sufficient for present purposes for us consider the correct approach in cases of this kind generally. That was the purpose of Collins J's order. We therefore return to the test. We have concluded that it is open to us to give at least some consideration to the test in circumstances in which this appears to us to be the first case in which the precise nature of the test has been exposed to detailed examination. As we indicated above, the test suggested by Miss Giovannetti was that a special advocate should only be appointed if it is necessary to do so. We do not think that such an approach is markedly different from that suggested in the cases. In any event, it seems to us that it will be necessary to appoint a special advocate where it would be just to do so. Given the very few cases in which these problems arise, viz some 138 in four years in circumstances in which about 100,000 applications for citizenship succeed each year, these are exceptional cases. In our view the test is best stated as being that a special advocate should be appointed where it is just to do so, having regard to the requirement that the proceedings must be fair to the claimant and to the Secretary of State.

Appropriate directions

36. In the course (and in the light) of the argument, we made some suggestions as to directions which might be appropriate in a case of this kind. Submissions were then made on all sides as to how we might improve the directions we had tentatively proposed. In the light of those submissions, we have reached the conclusion that the court considering what directions to make should have regard to the principles set out below. They assume that permission to apply for judicial review has been granted.

Although similar principles may be applicable at the permission stage, we do not set them out separately here in order to avoid making this judgment too cumbersome.

37. We now first set out the principles which it appears to us should be adopted and then explain the reasons for some of them in the light of the submissions which were made to us.

i) The general principles are that a person whose application for citizenship is refused is entitled to be told the reasons for the decision to refuse and that a claimant who challenges a refusal to grant British nationality on the grounds set out above is entitled to see all the material which the Secretary of State considered when reaching her decision and/or upon which she relies, whether favourable or unfavourable to the applicant.

ii) There are some exceptions to those general principles. They apply or, depending upon the circumstances, may apply to a case in which the Secretary of State (a) refuses an application for British nationality on the ground that she is not satisfied that the applicant is of good character and (b) refuses to disclose to the applicant for judicial review some or all of the material upon which she relied ('the material') and/or refuses to give any, alternatively any further, reasons on public interest grounds, including in particular on the ground that to do so would put national security at risk.

iii) In case (b), the Secretary of State should consider with counsel, who should consider the issue dispassionately, whether it is appropriate for the trial judge to have the assistance of a special advocate.

iv) The principles to be borne in mind are these:

a) A special advocate should be appointed where it is just, and therefore necessary, to do so in order for the issues to be determined fairly.

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

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

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

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

v) The Secretary of State should have those principles in mind in deciding what stance to take at the outset: viz whether to accept that a special advocate should be appointed, in which case she should invite the court to ask the Attorney General to appoint a special advocate, or whether to invite the judge to read the documents before deciding what step to take.

vi) In the latter case the judge should receive submissions from the parties (if necessary oral submissions) as to what course he or she should take. The Secretary of State should ordinarily indicate to the claimant and to the court in broad terms how many documents the judge is being asked to read.

vii) If the judge decides to read the documents, in order to consider whether or not a special advocate should be appointed, the Secretary of State should not make oral or written submissions in such a case but should include a short note merely identifying the key pages or documents in order to direct the judge to the relevant material and briefly stating the grounds upon which it is said that the material should not be disclosed or reasons or further reasons should not be given. The Secretary of State should ensure that all relevant material which is available to her, whether favourable or unfavourable to the claimant, is disclosed to the judge. The judge should apply the principles in paragraph iv) above. He or she may think it just to request the appointment of a special advocate if he or she is in doubt.

viii) The judge should then decide how to proceed in the light of all the circumstances of the case and after hearing oral open submissions.

ix) If the judge decides that a special advocate should be appointed he or she should request the Attorney General to appoint a special advocate to assist the court. The role of the special advocate is that identified in the cases; it is not the same as an *amicus curiae*.

38. We add these points by way of further explanation of some of the principles in the light of the detailed submissions we received.

i) In iii) we have added the word ‘dispassionately’, in order to underline the duty of counsel for the Secretary of State to consider the matter in order to assist the court, rather as counsel for the prosecution does in a criminal trial.

ii) In iv)c) we added ‘for example’ because the two types of case to which we refer are indeed no more than examples. There may be cases in which the court would think it just to appoint a special advocate in other circumstances, as for example where no or no significant reasons have been given or where it might be appropriate for consideration to be given to making a request for further documents. Moreover, judges should bear in mind the warning that a case may not be as open and shut as it appears: see the well known warning of Megarry J in *John v Rees* [1970] 1 Ch 345 at 402. Since all ultimately depends on the circumstances, it is not possible to predict all possible circumstances in advance. We accept the point made on behalf of the

claimants and alluded to by Sedley LJ at [23] of *Murungaru* quoted above that the judge should not be or appear to be drawn into the arena. Judges should have that consideration in mind throughout However, we do not think that judges should never look at documents for themselves and without assistance in order to decide, for example, whether they should be disclosed. As indicated above, CPR 31.19(6)(a) contemplates precisely that and it is a course which has been familiar to English judges at least since *Conway v Rimmer* [1968] AC 910 and which is commonly performed when considering PII applications in criminal cases. However, contrary to the submissions originally made on behalf of the Secretary of State (although not by Miss Giovannetti) we do not think that it is appropriate for the judge to receive submissions from counsel on behalf of the Secretary of State in the absence of either counsel for the claimant or a special advocate. We do not think that it is appropriate for the judge to test and probe the material with the benefit of counsel for only one side. We initially thought that it might be appropriate for the judge to look only at the material and not to receive any explanation. However, on balance, we have concluded that the judge should be furnished with a short document stating the grounds on which it is said that the public interest requires either that reasons or further reasons should not be given or that material should not be disclosed. In the context of disclosure, CPR31.19(3)(b) contemplates (indeed requires) precisely that. We see no injustice in this approach. It is to avoid even a possibility that it might be thought that the judge was entering the arena on one side that it seems to us that the example to which we refer in c)iv) as an example of a case in which the judge might take such a course is where there are very few documents and the judge can readily resolve the issues one way or the other by reading the material and without the assistance of a special advocate. If the judge has any doubt, he or she will no doubt conclude that fairness and justice require him or her to request a special advocate.

iii) As to c)vi), we think that the parties should be permitted to make open submissions on the question whether the judge should look at the documents in the first instance or appoint a special advocate immediately. Whether oral submissions will be necessary depends upon the circumstances of the case.

iv) As to c)ix), we do not think it is necessary to set out the various roles performed by special advocates. They are well understood and include taking instructions from the claimant, but only before the special advocate sees any of the closed material, considering whether further documents are required and whether gisting is possible, discussing the problems with counsel for the Secretary of State, making appropriate submissions to the court and testing and probing the evidence as the special advocate thinks fit.

39. If these principles are adopted, the decision of the judge will involve the exercise of a discretion, which we would not expect to be reviewed in this court, except on the very limited grounds appropriate in such a case.

A v United Kingdom

40. After writing the above we became aware of the decision of the Grand Chamber of the European Court of Human Rights ('the ECtHR') in the case of *A v United*

Kingdom, Application 3455/05, which was handed down on 19 February 2009. Because it appeared to be relevant or potentially relevant to the issues in this appeal, we invited the parties to make submissions relating to it and they have done so. Each contends that it strengthens the submissions they made at the hearing of the appeal. Thus some claimants say that it leads to the conclusion that a special advocate should be appointed in every case, whereas the Secretary of State says that it underlines the general approach of the ECtHR that all depends upon the circumstances.

41. The case of *A v United Kingdom* arose out of the detention of A and ten other non-UK nationals who had been detained under the Anti-Terrorism, Crime and Security Act 2001 ('ATCSA'). The House of Lords held at [2004] UKHL 56, [2005] 2 AC 68, that the detention was disproportionate and discriminatory. It granted an order quashing an order derogating from the ECHR and made a declaration that section 23 of ATCSA was incompatible with articles 5(1) and 14. The ECtHR reached the same conclusion with regard to article 5(1): see [190]. It decided that it was not necessary for it to consider article 14. For present purposes we are concerned only with the conclusions and reasoning of the court on a different question, namely the applicants' case that the United Kingdom was in breach of article 5(4) of the ECHR by reason of the lack of disclosure of material except to special advocates with whom the detainee was not permitted to consult: see [195]. The case advanced was that article 5(4) imported the fair trial guarantees of article 6 commensurate with the gravity of the issue at stake. It was argued that, while in certain circumstances it might be permissible for a court to sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond. In all the applicants' appeals, except that of the tenth applicant, SIAC relied on closed material and recognised that the applicants were thereby put at a disadvantage.

42. It can thus be seen that the question for decision was different from that in the instant appeals because it concerned an alleged violation of article 5(4) in the context of cases against individuals who were detained in circumstances where English law provided them with the assistance of special advocates but where it did not always provide even a gist of the case against them. The court was not therefore considering a case like these, where (as explained above), although refusal to grant British citizenship is a serious matter, the applicant is not threatened with a denial of or interference with his or her liberty. On the other hand in at least one of these cases, namely AS, the Secretary of State has refused to provide even a gist of the case against the claimant. In our judgment, although the court was not considering a case like these, some of the principles it identified are relevant to these appeals.

43. In so far as they are relevant for present purposes it is sufficient to summarise the principles adopted in *A* as follows:

    i) Article 5(4) provides a *lex specialis* in relation to the more general requirements of article 13: see *Chahal* at [126]. It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the 'lawfulness' of his or her deprivation of liberty. The notion of 'lawfulness' under article 5(4) has the

same meaning as in article 5(1), so that the arrested or detained person is entitled to a review of the 'lawfulness' of his detention in the light not only of the requirements of domestic law but also of the Convention. See [202].

ii) The requirement of procedural fairness under article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an article 5(4) procedure be attended by the same guarantees as those required under article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. See [203].

iii) Thus the proceedings must be adversarial and must always ensure 'equality of arms' between the parties. An oral hearing may be necessary, for example in cases of detention on remand. Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears *prima facie* to have a material bearing on the continuing lawfulness of the detention. It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him. See [204].

iv) Even in proceedings under article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities. See [205].

v) Thus, while the right to a fair criminal trial under article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the ECtHR has held that it might sometimes be necessary to withhold certain evidence from the defence on public interest grounds. So for example in *Jasper v UK* [2000] ECHR 27052/95 at [51] to [53] it found that the limitation on the rights of the defence had been sufficiently counterbalanced where evidence which was relevant to the issues at trial, but on which the prosecution did not intend to rely, was examined *ex parte* by the trial judge, who decided that it should not be disclosed because the public interest in keeping it secret outweighed the utility to the defence of disclosure. Importantly, in finding that there had been no violation of article 6, the ECtHR considered it significant that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing exercise and that steps had been taken to ensure that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing the material which the prosecution sought to keep secret: *Jasper* at [55] to [56]. By contrast, in *Edwards and Lewis v the United Kingdom*, nos 39647/98 and 40461/98, at [46] to [48] 46-

48, ECHR 2004-X, the ECtHR held that an *ex parte* procedure before the trial judge was not sufficient to secure a fair trial where the undisclosed material related, or may have related, to an issue of fact which formed part of the prosecution case, which the trial judge, rather than the jury, had to determine and which might have been of decisive importance to the outcome of the applicants' trials. See [206].

vi) In a number of other cases where the competing public interest entailed restrictions on the rights of the defendant in relation to adverse evidence, relied on by the prosecutor, the Court has assessed the extent to which counterbalancing measures can remedy the lack of a full adversarial procedure. For example, it has held that it would not necessarily be incompatible with article 6 for the prosecution to refer at trial to depositions made during the investigative stage, in particular where a witness refused to repeat his deposition in public owing to fears for his safety, if the defendant had been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage. It emphasised, however, that where a conviction was based solely or to a decisive degree on depositions that had been made by a person whom the accused had had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence would be restricted to an extent incompatible with the guarantees provided by article 6. See [207].

vii) Similarly, in *Doorson v Netherlands* [1996] ECHR 20524/92 at [68] to [76], the ECtHR held that there was no breach of article 6 where the identity of certain witnesses was concealed from the defendant, on the ground that they feared reprisals. The fact that the defence counsel, in the absence of the defendant, was able to put questions to the anonymous witnesses at the appeal stage and to attempt to cast doubt on their reliability and that the Court of Appeal stated in its judgment that it had treated the evidence of the anonymous witnesses with caution was sufficient to counterbalance the disadvantage caused to the defence. The ECtHR emphasised that a conviction should not be based either solely or to a decisive extent on anonymous statements. In each case, the ECtHR emphasised that its role was to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. See [208]

viii) The ECtHR has referred on several occasions to the possibility of using special advocates to counterbalance procedural unfairness caused by lack of full disclosure in national security cases, but it has never been required to decide whether or not such a procedure would be compatible with either article 5(4) or article 6 of the ECHR. See [209].

ix) In *Chahal* the applicant was detained under article 5(1)(f) pending deportation on national security grounds and the Secretary of State opposed his applications for bail and *habeas corpus* for reasons of national security. The ECtHR recognised at [130] to [131] that the use of confidential material might be unavoidable where national security was at stake but held that this did not mean that the executive could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. The court found a violation of article 5(4) in the light of the fact that

the High Court, which determined the *habeas corpus* application, did not have access to the full material on which the Secretary of State had based his decision. At [210] the ECtHR quoted this passage from *Chahal*:

> "[The Court] attaches significance to the fact that ... 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"

x) At [215] the ECtHR described the procedure before SIAC, which involved special advocates but not the individual's counsel seeing the material relied upon by the Secretary of State. At [216] it referred to the existence of what it had earlier accepted as being a 'public emergency threatening the life of the nation' and to the strong public interest in maintaining the secrecy of the state's sources of information.

xi) Balanced against these important public interests, however, was the applicants' right under art 5(4) to procedural fairness. Having regard to the dramatic impact of the lengthy and apparently indefinite deprivation of liberty on the applicants' fundamental rights, article 5(4) must import substantially the same fair trial guarantees as article 6 in its criminal aspect. See [217].

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

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

xiv) The special advocate could play an important role in counterbalancing the lack of disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case by-case basis, where the evidence was to a large extent disclosed and the open material

> played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. (The ECtHR gave some examples.) Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of article 5(4) would not be satisfied. See [220].

44. Having identified the relevant principles in the kind of case before it, namely that of detention, the ECtHR then considered the case of each individual applicant. Not having seen the closed material, it could not of course say whether a sufficient gist of the whole case against each person had been given to him. However, as we understand it, it did not ask to see the closed material but focused only on the open material and the conclusions of SIAC. Of the nine cases in which complaints under article 5(4) had been held to be admissible, it considered that in five cases the allegations were sufficiently detailed to permit the applicants to challenge them effectively, so that there had been no breach of article 5(4): see [222]. By contrast in the case of two of the applicants, although there was open evidence of large sums of money moving through his bank account and of involvement in raising money through fraud respectively, there was no evidence which allegedly provided a link with terrorism: see [223]. Also, in the case of the remaining two applicants, SIAC had indicated that the evidence against them was largely to be found in the closed material which they were not in a position effectively to challenge: see [224]. An infringement of article 5(4) was thus found in the case of four applicants.

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

46. We are not persuaded that the decision in *A v United Kingdom* leads to a different approach. Thus, depending upon the circumstances, it will be appropriate for a judge either to look at the documents and decide whether or not to request the appointment of a special advocate or not to look at the documents and to decide to make such a request. In our judgment, if the procedure we have identified is adopted, the judge, who is of course entirely independent of the parties, will be able to make an independent decision in order to enable each case to be dealt with fairly. He or she

will neither be nor be seen to be in any way partial because the process we envisage will not involve the Secretary of State making submissions to the judge at that stage.

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

48. In the upshot our essential conclusions are set out at [37], as explained at [38] and to some extent amplified at [46] and [47] above.

Application to the facts

49. Although many of the conclusions we have set out above are consistent with the views expressed by the judge, we have formulated them somewhat differently and the procedure adopted before the judge, through no fault of his own, was not quite the same as we have contemplated. As to the individual cases, the judge noted at [65] that, although there were differences between them, the court had not been invited to distinguish between them by either side. It appears to us that in these circumstances the most appropriate course now is for all the cases to be remitted to the judge (or, if he is not available, another judge) for consideration of each of them in the light of the principles we have set out above. It follows that we allow the appeal of the Secretary of State in the cases in which she is the appellant and we allow the appeal of FM. We stress, however, that we are not expressing any view as to whether a special advocate should or should not be appointed in any of the particular cases, although (without looking at the particular facts) it does seem to us at present that there is likely to be much to be said for such an appointment and the provision of an appropriate gist in the case of AS in which no such gist has yet been provided.

ANNEX A

Claimant	**Reasons for refusal**	**Immigration status**	**Permission status As before Blake J**	**Key document references in Supplementary Appeal Bundle**
AHK	"association with Iranian elements hostile to British national interests"	27.10.99 IRL as refugee 1.08.07 Wife Granted citizenship	Adjourned for permission and directions 24.04.08 HHJ Hickinbottom	Decision letters: p42, p27 Statement Claimant: p20 Grounds: p8

				AOS: p56
GA	"past activities on behalf of the… DHKP-C which is proscribed" On 24th January 2000 you participated in the occupation of the Goethe Institute in London with ten other persons, during which time leaflets referring to and seeking support for the DHKP-C prisoners were distributed. [supplementary bundle at **[126]**)	1995 ILR as refugee with spouse and children Family members granted citizenship	Paper refusal 18.02.08 HHJ Hickinbottom	Decision letters: p73, p74 Correspondence Claimant: p85 Grounds: p78 AOS: p114

AS	"it would be contrary to the public interest to give reasons in this case"		Lodged 4.09.08	Decision letters: p171, p175 Statement Claimant: p181 Grounds: p141 AOS: p189
MH	"association with known Islamist extremists, including a number who have been arrested under anti-terrorism legislation" "involvement in the procurement of false documents"	5.9.00 Arrives UK 24.03.03 ILR marriage	Granted 18.1.08 Collins J	Decision letters: p218, p238 Correspondence Claimant: p208, p212, p219 Grounds: p201 AOS: p245
FT & NT	"association with the PKK prior to the group's proscription" "In 1991 FT was arrested for causing criminal damage during a PKK demonstration at the	Resident in UK since 1991 13.11.99 Both recognised as refugees	Granted 12.02.08 DHCJ Supperstone	Decision letters: p299, p300 Statements Claimant: p319, p323, p331, p335 Correspondence

	Turkish Embassy in London. Between 1994 and 1998 FT's house was used as a contact address by several leading PKK activists. Between mid 1998 and late 1999 NT was in contact with senior PKK activists. He attended a PKK training camp and was working on behalf of the PKK in London." (supplementary bundle at [308-309])			Claimant: p288 Grounds: p 266, p312 AOS: p304