Neutral Citation Number: [2010] EWCA Civ 462

Case No: A2/2009/2419/EATRF

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
REF NO. UKEAT016809DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2010

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE SULLIVAN

- -

Between :

THE HOME OFFICE	**Appellant**
- and -	
TARIQ	**Respondent**

- -
- -

Mr James Eadie QC and **Miss Catherine Callaghan** (instructed by **Treasury Solicitors**) for the **Home Office**
Mr Robin Allen QC and Mr Paul Troop (instructed by **Russell Jones & Walker**) for **Mr Tariq**
Miss Judith Farbey (Special Advocate) (instructed by Mr Simon Gomes, **Special Advocates Support Office**) for **Mr Tariq**

Hearing dates: 22, 23 March 2010

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Judgment

Lord Justice Maurice Kay :

1. This is another case about closed material procedure and the use of special advocates (SAs). They first entered our lexicon of civil procedure, albeit without the present nomenclature, in the Special Immigration Appeals Act 1997, legislation which was prompted by *Chahal v United Kingdom* (1997) 23 EHRR 413. Since then they have been deployed in other proceedings, both civil and criminal, as exceptions to the fundamental principle of open justice. Today, this Court, identically constituted, has handed down judgment in *Al-Rawi and others v The Security Service and others* [2010] EWCA Civ 482 in which we held that a court does not have the power to order a closed material procedure in relation to a civil claim for damages. The first issue in the present case is whether an Employment Tribunal (ET) has such a power. If it does, the second issue is whether *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2009] 3 WLR 74 applies in this context so as to require the Home Office to provide a gist of the closed material upon which it seeks to rely to the employee and his legal representatives in the ET proceedings. There is a third ancillary issue.

2. The factual background can be briefly stated. Mr Tariq commenced employment with the Home Office in April 2003 as an immigration officer. He received the necessary security clearance. However, in August 2006 he was suspended from duty due to national security concerns and on 20 December 2006 all levels of security clearance were withdrawn from him. He was told that this was based on his close association with individuals suspected of planning to mount terrorist attacks and that it was considered that association with such individuals might put him at risk of their attempting to exert influence on him to abuse his position as an immigration officer. An internal appeal against the withdrawal of his security clearance was dismissed. He remains suspended.

3. The events which triggered the suspicion were the arrests on 10 August 2006 of Mr Tariq's brother and cousin in the course of an investigation into a suspected plot to mount a terrorist attack on transatlantic flights. The brother was released without charge. The cousin, Tanveer Hussain, was charged, prosecuted and eventually convicted. He is now serving a sentence of life imprisonment for conspiracy to murder.

4. Mr Tariq is a Muslim of Asian/Pakistani ethnic origin. He commenced proceedings in the ET in March 2007 claiming that his suspension and the withdrawal of his security clearance were acts of direct or indirect discrimination on the grounds of race and/or religion. There has yet to be a substantive hearing in the ET. The last three years have been taken up with a procedural dispute about whether a closed material procedure and a SA should be deployed (as the Home Office contends but Mr Tariq opposes) and, if so, whether *AF(No.3)* imposes a gisting duty (as Mr Tariq contends but the Home Office opposes).

5. By a determination dated 5 March 2009, the ET held that it had power to adopt a closed material procedure and that it would hear the closed evidence before the open evidence. Mr Tariq appealed to the Employment Appeal Tribunal (EAT). Between the decision of the ET and the hearing of the EAT, *AF(No.3)* was decided in the House of Lords on 10 June 2009. *AF(No.3)* was conditioned by the Strasbourg case of *A v United Kingdom* (2009) 49 EHRR 29 in which judgment was delivered on 19

February 2009 – a month after the hearing in the ET in the present case and shortly before the ET promulgated its decision. The EAT upheld the decision of the ET that the closed material procedure is lawful and appropriate. However, it concluded that, in the light of *AF(No.3)*, Article 6 of the ECHR entitled Mr Tariq to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal representatives so that those allegations can be effectively challenged.

6. Now, in this Court, the Home Office appeals on the *AF(No.3)* point and Mr Tariq cross-appeals on the point of principle as to whether a closed material procedure is lawful in the ET. Logically, that is the first issue. In addition, there is a continuing issue as to whether (assuming that a closed material procedure is lawful) the ET was correct about the sequencing of the evidence.

The statutory framework

7. Whereas *Al-Rawi* fell to be decided in a statutory vacuum, there is a statutory framework in relation to ET proceedings which provides for a closed material procedure and the appointment of a SA in a national security case. The case for Mr Tariq is that the statutory provisions offend both EU law and Article 6 of the ECHR. At this point, it is appropriate simply to set out the statutory provisions.

8. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 were enabled by sections 7 and 10 of the Employment Tribunals Act 1996 (as amended). The Employment Tribunals Rules of Procedure 2004 form Schedule 1 to the 2004 Regulations. Rule 54(1) provides:

> "A Minister of the Crown … may, if he considers it expedient in the interests of national security, direct a tribunal or Employment Judge by notice to the Secretary to –
>
> (a) conduct proceedings in private for all or part of particular Crown employment proceedings;
>
> (b) exclude the claimant from all or part of particular Crown employment proceedings;
>
> (c) exclude the claimant's representatives from all or part of particular Crown employment proceedings;
>
> (d) take steps to conceal the identity of a particular witness in particular Crown employment proceedings."

Whether or not a Minister of the Crown so directs, Rule 54(2) empowers a Tribunal or Employment Judge, if it or he considers it in the interests of national security, by order to –

> "(a) do … anything which can be required by direction to be done in relation to particular Crown employment proceedings under paragraph (1)."

There are ancillary powers to restrict disclosure and to keep secret all or part of the reasons for a judgment. Rule 54(4) then provides:

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

9. These provisions are supplemented by the Employment Tribunals (National Security) Rules of Procedure 2004 which are to be found in Schedule 2 to the 2004 Regulations. For present purposes, I can simply record that Rule 8 provides for the appointment of a SA by the Attorney General

> "to represent the interests of the claimant in respect of those parts of the proceedings from which
>
> (a) any representative of his is excluded;
>
> (b) both he and his representative are excluded; or
>
> (c) he is excluded, where he does not have a representative."

10. Broadly speaking, a SA in an ET is in the same position as a SA in the Special Immigration Appeals Commission or in control order proceedings in the Administrative Court.

11. In the present case, on 15 February 2008 the Regional Employment Judge made an order under Rule 54(2) for the exclusion of Mr Tariq and his representatives from any part of the proceedings when closed evidence was being adduced, for the appointment of a SA and for the entirety of the proceedings to be held in private. Mr Tariq raises no issue on appeal about the ET hearing being private.

Issue 1: the lawfulness of closed material procedure

12. The primary submission advanced on behalf of Mr Tariq by Mr Robin Allen QC by way of cross-appeal is that the domestic legislation providing protection against discrimination contained in the Race Relations Act 1976 and the Employment Equality (Religion and Belief) Regulations 2003 must comply with the relevant provisions of (1) European Union law in the form of Council Directive 2000/43/EC of 29 June 2000 ("the Race Directive") and Council Directive 2000/78/EC of 27 November 2000 ("the Equal Treatment Framework Directive") and (2) Article 6 of the ECHR. The skeleton argument on behalf of Mr Tariq asserts:

> "... secret evidence is not permissible at all in cases such as the present ... because there is no provision for such a secret hearing in the two Directives and it is not consistent with Article 6."

EU Law

13. Mr Allen's most fundamental submission is that to the extent that the domestic Regulations purport to provide a closed material procedure they constitute an

unlawful derogation from the right not to be discriminated against as provided in the two Directives. Interestingly, there is a noticeable textual difference between the Directives. Article 2(5) of the Equal Treatment Framework Directive provides:

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

14. The Race Directive, on the other hand, contains no such express provision. However, both Directives contain provisions obliging Member States to have judicial and/or administrative procedures for the enforcement of obligations pursuant to them: see Race Directive, Article 7(1); Equal Treatment Framework Directive, Article 9(1).

15. In support of his unlawful derogation submission, Mr Allen seeks to rely on *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] 1 QB 129, a judgment of the European Court of Justice. At that time the governing Directive on equal treatment was Council Directive 76/207/EEC, Article 6 of which contained an express effective judicial remedy requirement. Article 53(1) of the Sex Discrimination (Northern Ireland) Order 1976 provided that none of its provisions prohibiting discrimination

> "shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order."

16. Article 53(2) then provided that a certificate signed by or on behalf of the Secretary of State and certifying that a specified act was done for an Article 53(1) purpose

> "shall be conclusive evidence that it was done for that purpose."

17. The Chief Constable decided that male officers but not female officers should be routinely armed. Mrs Johnston alleged discrimination and challenged the Article 53(2) certificate. The ECJ held (at paragraph 17) that, by reference to Article 6 of the Directive

> "the Member States must take measures which are sufficiently effective to achieve the aim of the Directive and ... they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned."

It added (at paragraphs 18 and 20):

> "The requirement of judicial control stipulated by [Article 6 of the Directive] reflects a general principle of law which underlies the constitutional traditions common to the Member States ...

> A provision which ... requires a certificate ... to be treated as conclusive evidence that the conditions for derogating from the principle of equal treatment are fulfilled allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights confirmed by the Directive. Such a provision is therefore contrary to the principle of effective judicial control laid down by Article 6 of the Directive."

18. That Directive contained no express provision concerning national security or public safety. The ECJ therefore held (at paragraph 28) that acts of sex discrimination done for such reasons "must be examined in the light of the exceptions to the principle of equal treatment ... laid down in [the Directive]".

19. I do not consider that the present case is in *Johnston* territory. Essentially, Mrs Johnston's Directive-derived right not to be subjected to sex discrimination had been removed by executive certification. The certificate not only curtailed her procedural rights. It effectively took away her substantive right. In the present case, on the other hand, the closed material procedure does not take away the substantive rights in question. It simply modifies the procedure. I accept that the question can arise as to whether a national procedural provision "renders application of Community law impossible or excessively difficult" (*Peterbroeck v Belgium*, Case C-312/93, paragraph 14) but that, too, is an aspect of overall *procedural* fairness in EU and ECHR law.

20. The most recent of the relevant ECJ authorities is *Kadi v Council of European Union* [2008] 3 CMLR 41 which concerned Council Regulation 881/2002 by which, pursuant to resolutions of the United Nations Security Council, the funds of associates of Osama bin Laden, Al-Qaeda or the Taliban were frozen. The factual matrix is important. The individuals concerned were provided with no procedural protection whatsoever. The decision of the Court was based on "settled case law", namely (paragraph 335)

> "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to Member States, which has been enshrined in Articles 6 and 13 of the ECHR."

21. The complaints of procedural unfairness were upheld. However, the Courts acknowledged (at paragraph 342) that

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

It made clear (at paragraph 344) that, ultimately, it was a matter of balance between

> "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 hand, the need to accord the individual a sufficient measure of procedural justice." (Emphasis added).

Moreover, that sufficiency was conditioned by ECHR Article 6 standards, reference being made expressly to *Chahal v United Kingdom* (1997) 23 EHRR 413.

22. I do not find in any of the authorities relied upon by Mr Allen support for the proposition that a substantive right derived from a Directive cannot, without express provision in the Directive, be subjected to exceptional procedure in the interests of national security or public safety. Whilst the substantive right may not be taken away without an express derogation provision (*Johnston*) and the reduction of procedural rights will attract appropriate scrutiny to ensure that effective judicial protection has not been lost (*Kadi*), this does not mean that EU law will not countenance a closed material procedure when the enforcement of Directive-derived substantive rights are in issue. Indeed, the whole thrust of *Kadi* is that the focus is on "the need to accord the individual a sufficient measure of procedural justice". A point may come where procedural restrictions so circumscribe a substantive right as to render its enforcement "impossible or excessively difficult" (*Peterbroeck*) but I do not consider that such a point has been reached in this case. Moreover, it seems to me that, as Mr Eadie QC submits, the ECJ authorities apply the same approach to procedural fairness as is found in the application of Article 6 of the ECHR by the Strasbourg Court.

ECHR Article 6

23. That leads me to Mr Allen's next submission, namely that the closed material procedure contained in the domestic Regulations fundamentally contravenes Article 6. In my judgment, this submission, in its fullest form, is unsustainable. The closed material procedures prescribed by or under the Special Immigration Appeals Commission Act 1997 and the Prevention of Terrorism Act 2005, far from being inherently non-compliant with Article 6, are sanctioned in principle by decisions of the Strasbourg Court. The 1997 Act was a domestic response to *Chahal*, in which the court put its imprimatur on the closed material procedure prescribed in Canada. It stated (at paragraph 131):

> "... 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."

24. Indeed from *Chahal* to *A v United Kingdom* in 2009 the focus has been not on any inherent incompatibility of a closed material procedure with Article 6 but on the safeguards which Article 6 requires a closed material procedure to include. I shall have to return to such safeguards when I address Issue 2.

25. Any use of a closed material procedure is of course exceptional and requires justification. It is common ground that the procedure must be necessary, in the sense

of directed to a proper social objective and no more restrictive than is required to meet that objective; and it must be sufficiently counterbalanced with appropriate protections. It is well established that the protection of national security and public safety can necessitate in that sense a closed material procedure (see *A* and its domestic progeny *AF (No.3)*) and that effective counterbalancing factors can be found in scrutiny by an independent court or tribunal and the use of SAs. Subject to a novel and more detailed critique of the domestic SA system advanced by Mr Allen, it seems to me that it is not inherently incompatible with Article 6 for a domestic statute to prescribe or enable the use of a closed material procedure in the interests of national security.

26. Mr Allen is constrained to concede that deployment of SAs under the Special Immigration Appeals Commission Act and the Prevention of Terrorism Act has survived scrutiny in the domestic appellate courts and in Strasbourg, subject to the point I shall deal with as Issue 2. However, his submission is that there are aspects of the system that have not been considered in the existing jurisprudence and he invites reappraisal by reference to them. He points to the fact that SAs are appointed by the Attorney General who is also the Government's principal legal adviser; that they are supported by a unit within the Treasury Solicitor's Department, who acts for the Home Office in this and similar cases; that this gives rise to a conflict of interest which would not be permitted in private litigation and indeed is prohibited without exceptions by Rule 3.01(1) of the Solicitors' Code of Conduct; and that there are no published rules governing the role and conduct of an SA in an Employment Tribunal.

27. In *Regina v H* [2004] 2 AC 134, [2004] UKHL 3 the House of Lords considered doubts which had been expressed about the system whereby the Attorney General appoints SAs, albeit in the context of criminal proceedings. Giving the unanimous opinion of the Appellate Committee, Lord Bingham said (at paragraph 46):

> "In my opinion such doubt is misplaced. It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice ... It is in that capacity alone that he approves the list of counsel judged suitable to act as Special Advocates ... Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested."

I consider that that effectively disposes of Mr Allen's point about the role of the Attorney General.

28. The submission about conflict of interest in the office of the Treasury Solicitor was made by reference to *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 which was concerned with the effectiveness of "Chinese walls" in a private professional practice. Lord Millett said (at page 239D):

> "... an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on evidence sworn for the purpose by members of staff engaged on the relevant work."

29. At the hearing of the present appeal, much of the argument on this issue proceeded by way of assertion and counter-assertion. This led us to invite post-hearing written amplification which we now have. The work of the Special Advocates' Support Office (SASO) is described as follows.

30. SASO was set up in 2006 in response to the recommendation of the Constitutional Affairs Select Committee in its report on the operation of the Special Immigration Appeals Commission and use of SAs (7th report, session 2004-5, 3 April 2005). The functions of SASO are described in *Special Advocates – A Guide to the Role of Special Advocates and the Special Advocates' Support Office*, which is published on the Treasury Solicitor's Department's website. It is SASO that provides an SA with formal instructions. It also provides legal and administrative support to SAs and acts as the librarian of closed case law for them. Although formal instructions originate with SASO, it has no input into decisions such as whether to appeal a closed adverse judgment or to open part of a closed judgment. Such matters are for the independent judgment of the SA alone. Although SASO is physically located within the premises of the Treasury Solicitor at One Kemble Street, it has an established Chinese wall arrangement and is for all practical purposes a separate entity. It comprises five lawyers and three administrators. Four lawyers and two administrators form the SASO (closed) team, the remaining lawyer and administrator forming the SASO (open) team. The open team does not have security clearance. It alone communicates with the litigant's open representatives. Although other relevant litigation teams within the office of the Treasury Solicitor are able to share their facilities, this is not so in relation to SASO's resources and facilities. It has completely separate document-handling, communication, storage and technology facilities. The four lawyers who carry out casework on cases in which the SAs are instructed do not carry out any work for any other part of the Treasury Solicitor's office. The fifth lawyer is at Grade 6 level. He does not have his own casework in relation to cases involving SAs. His role is more supervisory and he has a wider line management role which extends to the general private law litigation team. He may report to the Attorney General but only in relation to open issues in matters where SAs are instructed. In addition, in order to protect the independence of the SASO team, there are conflict checks to ensure that other members of the private law team do not act in cases which are in any way relevant to SASO.

31. In his most recent written submission, Mr Allen says that all this provides insufficient reassurance. It lacks evidence of physical separation, continuing training, carefully defined procedures, monitoring, disciplinary sanctions and so on. It is wholly inappropriate and wholly inadequate to prevent the risk of advertent or inadvertent disclosure of sensitive, privileged and confidential information "within different parts of the Treasury Solicitor".

32. I do not find these submissions persuasive. The procedure is anomalous but it seems to me that it is in substantial conformity with Lord Millett's test. I identify no error of law in the EAT's conclusion that the system permits SAs to do their work effectively and independently and subjects them to proper scrutiny. If I may be permitted a

subjective observation: if such problems were evident they would be expected to provoke adverse judicial comment but, in my experience, the system, although inherently imperfect, enjoys a high degree of confidence among the judges who deal with cases of this kind on a regular basis. I am satisfied that the functioning of SASO does not infringe Mr Tariq's Article 6 right to a fair trial.

Conclusion on Issue 1

33. For all these reasons I am satisfied that the cross-appeal asserting breaches of both EU and ECHR rights fails.

Issue 2: Does AF(No.3) apply to the proceedings in the ET?

34. Having held that the procedure for national security cases prescribed in the Employment Tribunals Rules of Procedure 2004 and the Employment Tribunals (National Security) Rules of Procedure 2004 is not in essence unlawful by reference to EU law or Article 6 of the ECHR, the next question is whether Article 6 impacts upon the content of the Rules. This requires consideration of whether *AF(No.3)* and *A v United Kingdom* which informed it give rise to a disclosure obligation upon the Home Office over and above disclosure to a SA. The case for the Home Office, which was rejected by the EAT, is that *AF(No.3)* and *A* do not apply to a case such as this. It was the appeal of the Home Office on this issue which first brought the present case into this Court.

35. As is well-known, the factual context of *A* was the system of detention without charge or trial created by the Anti-Terrorism, Crime and Security Act 2001 and that of *AF(No.3)* was its replacement – the non-derogating control order – introduced by the Prevention of Terrorism Act 2005. As Mr Eadie QC correctly observes, the factual context of the present case is rather different. Whereas in *A* and *AF(No.3)*, the State was seeking to interfere with the personal liberty of the detainee or controlee, either by deprivation or restriction, in the present case Mr Tariq is seeking to enforce his private right not to be subjected to discrimination, albeit that the alleged discriminator is a public authority. This leads Mr Eadie to point to statements in the leading cases to the effect that the requirements of Article 6 vary with the context.

36. In *Brown v Stott* [2003] 1 AC 681, the first of the Article 6 cases to be considered by the House of Lords after the coming into force of the Human Rights Act, Lord Bingham said (at page 693E):

> "What a fair trial requires cannot, however, be the subject of a single unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European court has consistently done."

37. The subject-matter there was the privilege against self-incrimination in a criminal case. In the context of non-derogating control orders before *AF(No.3),* Baroness Hale said in *Secretary of State for the Home Department v MB* [2007]UKHL 46, [2008] 1 AC 440, (at paragraph 57):

> "Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential

> ingredients of a fair trial can vary according to the subject-matter and nature of the proceedings."

38. It is by reference to passages such as these that Mr Eadie contends for a narrow interpretation of *AF(No.3)*. He submits that support for such an approval can be found in *AF(No.3)* itself, where Lord Phillips observed (at paragraph 57):

> "The requirements of a fair trial depend, to some extent, on what is at stake in the trial."

And (at paragraph 65):

> "The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."

39. Mr Eadie suggests that the words I have emphasised leave room for manoeuvre in a different context including the present case.

40. He then points to *Leander v Sweden* 9248/81, 26 March 1987, which was concerned with security-vetting in an employment context and in which the Strasbourg Court said (at paragraph 66):

> "The fact that the information released to the military authorities was not communicated to Mr Leander cannot by itself warrant the conclusion that the interference was not 'necessary in a democratic society in the interests of national security' as it is the very absence of such communication which, at least partly, ensures the efficacy of the personnel control procedure."

41. *Leander* influenced the recent decision of the Security Vetting Appeals Panel (Sir George Newman, Silber and Bennett JJ) in *G and Y v Home Office* (4SCY 5/1/22 and 4SCY 5/1/29). The principal finding there was that Article 6 did not apply because the SVAP does not determine any civil rights. It only makes recommendations. However, on the alternative hypothesis that Article 6 did apply, *AF(No.3)* was considered distinguishable by reference to what Lord Phillips had said at paragraph 65 (see paragraph 38, above).

42. On the basis of all this, Mr Eadie invites us to say that, as the context is not one in which the State is seeking to interfere with Mr Tariq's liberty or anything comparable, and as the authorities do not insist on disclosure in all circumstances, *AF(No.3)* does not apply in this case. Moreover, he submits, the Home Office should not be put in the invidious position of having to choose between disclosure of sensitive material (as a condition of contesting Mr Tariq's discrimination claim) and capitulation. He refers to the statement of Laws LJ in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786, (at paragraph 36):

> "... a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all."

43. It is important to keep in mind what is in issue here. It is not the closed material procedure *per se*. I have addressed that earlier in this judgment. Nor is it disclosure of particular documents. It is the right of a litigant to know the essence of the case against him, if necessary by "gisting". The starting point, whether at common law or by reference to Article 6, is that described by the Master of the Rolls in *Al-Rawi* (at paragraph 30):

> "Unlike principles such as open justice or the right to disclosure of relevant documents a litigant's right to know the case against him ... is fundamental to the fairness of a trial."

44. Although Parliament may prescribe special procedures in the interests of national security or for other reasons, and although in so doing it may curtail to an extent some characteristic of a fair trial without breaching the requirements of Article 6 (as the earlier part of this judgment illustrates), the right of a litigant to know the case against him is of particular importance because it is a prerequisite to his being able not merely to deny, but actually to refute (in so far as that is possible) that case. Whilst, in totality, the requirements of fairness may not be immutable, some of them are of more fundamental importance than others.

45. I do not read *AF(No.3)* as authority for the proposition that, in other contexts, the right of a litigant to know the essence of the case against him will be readily eroded. Lord Phillips, with whom the other members of the Appellate Committee all expressed agreement, rejected the submission that *A v United Kingdom*, which concerned detention, did not apply to non-derogating control orders. He said (at paragraph 57):

> "I do not consider that the Strasbourg court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial."

46. Lord Hoffmann said (at paragraph 70):

> "... the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are never satisfied if the decision is 'based solely or to a decisive degree' on closed material."

47. The emphasis of never is Lord Hoffmann's. Lord Hope said (at paragraph 84):

> "If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him."

48. Lord Scott expressed himself in more general terms, basing his proposition on the common law (at paragraph 96):

> "An essential requirement of a fair hearing is that a party against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree

> of detail ... must ... be sufficient to enable the opportunity to be a real one."

49. Lord Brown added (at paragraph 116):

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

The emphasis of always is Lord Brown's.

50. In my judgment, the present case is not put in a different category by the fact that the Secretary of State is not seeking to subject Mr Tariq to a control order but is simply defending a discrimination claim. Nor is it to the point that the ultimate issue is discrimination rather than the accuracy of the closed material. The fact is that the Home Office is seeking to rely on closed material in its defence. Whilst the Rules permit that, it seems to me that the principle illustrated by *AF(No.3)* must apply to ensure that fairness to which Mr Tariq is entitled by Article 6 and at common law. I do not consider that *Leander* is authority to the contrary. It is now over 20 years old and the judgment of the Court was not on Article 6 but on Articles 8 and 10. The authorities on Article 6 have undergone visible development since then, as *A v United Kingdom* demonstrates. So have the authorities on Article 10: see *A v Independent News* [2010] EWCA Civ 343, at paragraph 41. I appreciate that, in a particular case (and we cannot yet know if this is one such) this may put the public authority in the invidious position of having to make difficult decisions about disclosure and whether or how a claim is to be defended. All that is for the future in this litigation. It is the consequence of the requirements of justice. For present purposes, I am satisfied that the judgment of the EAT was correct on this point and that the appeal of the Home Office should be dismissed.

Issue 3: An ancillary point on procedure

51. The third issue considered by the EAT in paragraphs 40 – 45 of its judgment was : "should the Tribunal hear the open evidence before it considers the closed evidence?" The EAT ordered that:

> "in deciding whether to order further materials to be disclosed to the Appellant in order to ensure that the hearing of his claim for discrimination is fair, the Employment Tribunal should first be informed of what the parties' open cases are, and should then be informed in closed session what the Respondent's case is."

52. In paragraph 72 of its reserved reasons dated 5th March 2009 the ET had said:

> "At present the Tribunal does not know what the Respondent's case is. The Tribunal is persuaded that in the interests of fully understanding the case before it and, thus, deciding the case

> fairly in accordance with the overriding objective, it must hear the closed evidence first. "

53. The EAT correctly distinguished between two stages of the process if the Respondent is to be permitted to rely on closed material in resisting the claim before the Employment Tribunal: (i) a preliminary hearing at which the ET will decide what (if any) additional material must be disclosed to Mr Tariq, or if not disclosed may not be relied upon, in order to ensure that the substantive hearing is Article 6 compliant; (ii) the substantive hearing at which the ET will hear both the open evidence (including any additional material disclosed as a result of (i)) and the closed evidence.

54. The EAT recognised in paragraph 44 of its judgment that any view formed by the ET at stage (i) must necessarily be provisional because it will be under a continuing duty to keep matters under review so as to ensure that the hearing continues to be Article 6 compliant. Fairness may require that further evidence is given to Mr Tariq in view of the way in which the case develops.

55. Although the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 make provision for closed hearings, and in Schedule 2 for the appointment of a SA, there are no provisions comparable to CPR 76.28 and 76.29 which require the High Court in control order proceedings to consider, with the assistance of the SA, prior to the substantive hearing, whether the Secretary of State should be permitted to withhold closed material, or whether all or any part of that material, or a summary of it, should be disclosed to the controlee, and if the Secretary of State declines to do so, whether he should be allowed to rely on the undisclosed material.

56. If the ET's decision that it would hear the closed evidence first was a ruling that it would, before proceeding to the substantive hearing, conduct a preliminary hearing in order to decide, at least initially, what parts (if any) of the closed material should be disclosed, whether or not in summary form, to Mr Tariq in order to ensure that the substantive hearing will be Article 6 compliant, it was, in my view an eminently sensible decision. The parties' open cases should be tolerably clear from the pleadings. Although the preliminary hearing would be closed to Mr Tariq, there is no reason why those representing him should not be able to make written or oral representations to the ET prior to the closed hearing, highlighting any areas where the lack of particularity in the open material is causing them particular difficulty and inviting the ET to pursue those issues in the closed hearing.

57. While the order in which the evidence is called at the substantive hearing must be a matter for the ET's discretion, in the exercise of that discretion it should, in my view, give substantial weight to the procedural wishes of the party who is necessarily being placed at a disadvantage by the adoption of a procedure under which he and his legal representatives will be excluded from part of the proceedings, and will not be allowed to see the closed evidence which is being deployed in response to his claim. If his legal representatives, and/or the SA who will represent his interests in the closed part of the hearing, are of the opinion that his interests would be best served by hearing the open evidence before the closed evidence at the substantive hearing and make an application for a direction to that effect, there would have to be very cogent reasons indeed to justify a decision by the ET that the closed evidence should be heard before the open evidence. Although the SA, having seen the closed material, is no longer

able to obtain Mr Tariq's instructions, she may well be materially assisted by hearing the open cases, and in particular by hearing the cross examination of the respondent's open case, before the closed evidence is called.

Conclusion:

58. It follows from what I have said that I would dismiss the appeal of the Home Office (Issue 2) and Mr Tariq's cross-appeal (Issue 1). Issue 3 is a minor point of clarification and guidance which augments the view expressed by the EAT but does not significantly contradict it.

Lord Justice Sullivan:

59. I agree.

The Master of the Rolls

60. I also agree.