IN THE EUROPEAN COURT OF HUMAN RIGHTS **APP NOs 46538/11 and 3960/12**
B E T W E E N:-

GULAM HUSSEIN AND TARIQ

Applicants

-v-

THE UNITED KINGDOM

Respondent Government

THIRD PARTY INTERVENTION SUBMISSIONS BY JUSTICE[1]

INTRODUCTION AND SUMMARY

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance access to justice, human rights and the rule of law. It is the British section of the International Commission of Jurists and one of the leading civil liberties and human rights organisations in the UK. It welcomes the opportunity to intervene, as a third party in this case, by the leave of the Court granted 5 June 2012.

2. In *Home Office v Tariq* [2011] UKSC 35, a majority of the UK Supreme Court held that, if a dispute is to be determined on its merits, the right to a fair hearing under Article 6(1) does not entitle a party to disclosure of sufficient information about the case against him to enable him to effectively challenge it.[2] In doing so, the majority placed particular reliance on the ECtHR's judgments in *Kennedy v United Kingdom* (no 26839/05, 11 May 2010), *Ebester v United Kingdom* (1994) 18 EHRR CD72 (Commission admissibility decision) and *Leander v Sweden* (1987) 9 EHRR 433.[3]

3. In light of the Supreme Court decision in *Tariq*, JUSTICE submits that:

(i) the right to a fair hearing comprises a number of constituent elements, including the right to be heard; the right of a party to know the case against him and the evidence supporting it; the right to adversarial procedures and equality of arms; and the right to a reasoned decision;

(ii) any limitations on these constituent rights will be compatible with a person's right to a fair hearing in any justiciable case under article 6(1) only if (a) they are strictly necessary to achieve a legitimate objective and (b) they do not impair the very essence of that person's right to a fair hearing;

(iii) the use of closed material proceedings involves drastic restrictions on each of these constituent elements of the right to a fair hearing which are not strictly necessary to protect information which on balance it would be contrary to the public interest to disclose and the very essence of the excluded party's right to a fair hearing will be impaired in particular if (a) sufficient information about the substantive case that he has to meet to enable him to challenge it effectively is not disclosed to him and (b) sufficient reasons are not provided to him to enable him to see whether the tribunal has fairly determined the dispute and whether it has made any material error;

(iv) neither the involvement of an independent and impartial tribunal nor the use of special advocates can properly be regarded as "counterbalancing measures" sufficient in such circumstances to offset the essential unfairness to the excluded party of closed material proceedings;

(v) *Ebester v* UK (supra) and *Leander v Sweden* (supra) were not decisions on the requirements of article 6. The judgment of the Court in *Kennedy v United Kingdom* (supra) is incompatible with its previous case law on both the justiciability of secret surveillance decisions and the essential requirements of a fair hearing. It eviscerates the right to a fair hearing of any content.

4. As directed, these submissions do not comment on the facts or merits of the case.

THE CONSTITUENT ELEMENTS OF A FAIR HEARING UNDER ARTICLE 6(1)

5. Although it may be derogated from in times of public emergency,[4] the right to a fair hearing remains absolute[5] and fairness is its essence.[6] The Court has reiterated on a number of occasions, "the right to the

fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience" (*Ramanauskas v Lithuania* (no. 74420/01, 5 February 2008 (Grand Chamber)),§53; *Lalmahomed v Netherlands* (no 26036/08, 22 February 2011), §36).[7] As Lord Brown described it, it is "not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control" (*Secretary of State for the Home Department v MB* [2007] UKHL 46 at §91). Moreover, as the Court has repeatedly said, "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively": see eg *AB v Slovakia* (2003) No 41784/98 at §54.

6. A fair hearing under article 6(1) comprises several interrelated elements. These include the right of each party to (i) be heard; (ii) an adversarial hearing and equality of arms; (iii) know the case against him and the evidence on which it is based; and (iv) a reasoned judgment. Each of these constituent rights is underpinned by the concept of effective participation in the proceedings. Their precise content may vary depending, among other things, on whether the proceedings are criminal or civil, but none may be completely denied or nullified. Without them, a hearing can no longer be said to be fair.

7. The right to be heard in the determination of one's civil rights "is one of the most fundamental rights under article 6(1)" (*Georgiadis v Greece*, no 21522/93, 27 February 1996 (Commission), § 47). As the Court subsequently held, "a procedure whereby civil rights are determined without ever hearing the parties' submissions cannot be considered to be compatible with article 6(1)" (*Georgiadis* (1997) 24 EHRR 606 at §40). A person's right to be heard in the determination of his or her civil rights or obligations is not merely a right to present one's own case. It necessarily involves the right to be heard on the merits or deficiencies of any opposing case which he has to meet. As Lord Denning said in *Kanda v Government of Malaya* [1962] AC 322 at 337: '[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him'.[8] A party's case necessarily involves his response to others'.

8. Thus, the right to adversarial proceedings is necessarily involved in the right to a *hearing*. The weight attached to this reflects the principle *audi alteram partem* ('let the other side be heard'), one of the core rules of natural justice.[9] As Seneca wrote, "he who decides something without hearing the other side is not just, even if he makes a just decision".[10] Francis Bacon similarly described *audi alteram partem* as "not of the formality, but the essence of justice".[11] More recently, Dyson LJ referred to the denial of the right to make representations as "not a mere formal or technical breach" but as "a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely, the right to be heard" (*R(Wright and others) v Secretary of State for Health* [2007] EWCA Civ 999 at §106).

9. If a hearing is to be fair, the parties must also be treated equally. Accordingly "the principle of equality of arms - one of the elements of the broader concept of fair trial - requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-á-vis his or her opponent": see eg *AB v Slovakia,* supra at §55. As the Court held in *Zhuk v Ukraine* (no 45783/05, 21 October 2010) at §25, "this implies, in principle, *the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed ... with a view to influencing the court's decision...* [emphasis added]."

10. As Upjohn LJ held in *Re K* [1963] Ch 381, 405-406:

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

In *Al Rawi and others v Security Service and others* [2011] UKSC 34 at §12, Lord Dyson similarly made clear the fundamental nature of the principles involved:

> trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance.

11. In *A and others v United Kingdom* (no 3455/05, 19 February 2009), the Grand Chamber concluded that a suspect's right to know the case against him was important even in the context of national security proceedings involving a valid derogation under article 15 due to a terrorist emergency:

> in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5(4) must import *substantially the same fair trial guarantees as Article 6(1) in its criminal aspect*. [§217, emphasis added].

Specifically, it held that article 5(4) required each detainee to be "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" (§ 220). However, the Court has yet to consider the compatibility of the use of special advocates in civil proceedings with article 6(1).[12]

12. The approach of the Grand Chamber in *A and others* was followed by the Grand Chamber of the Court of Justice in *Case C- 402/05 Kadi v Council of the European Union* [2009] 1 AC 1225 at §§283-284 and §§342-348, and the General Court in *Case T-85/09 Kadi v Council of the European Union (No 2)* at §§173- 177, in cases involving the freezing of assets (a loss of use of property). In those cases, the General Court indicated that a party may not only require details of the allegations against him but also, if necessary, the supporting evidence (see e.g. *Kadi* [2009] at §§347-349). As Lord Hope put it in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 at §83, "the fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him".[13]

13. Nor does it matter whether the outcome of any dispute is detention, loss of employment, loss of property, interference with family life or any other consequence[14]. In *Greene v McElroy* (1959) 360 US 474, the US Supreme Court was asked to consider the appeal of an aeronautical engineer whose security clearance was withdrawn by the Department of Defense following a series of administrative hearings in which he was denied access to much of the information adverse to him and any opportunity to confront or cross-examine witnesses against him. As a consequence of the loss of security clearance, the appellant lost his job and was unable to gain other employment as an aeronautical engineer. In delivering the judgment of the court, Chief Justice Warren said (pp496-497):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, *the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and crossexamination. They have ancient roots. They find expression in the Sixth Amendment, which provides that, in all criminal cases, the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out *not only in criminal cases … but also in all types of cases where administrative and regulatory actions were under scrutiny…* [emphasis added].

14. Thus "a fair trial presupposes adversarial proceedings and equality of arms": see eg *Mirilashevili v Russia*, no 6293/04, 11 December 2008, §157[15].

15. A further constituent element of a fair hearing is the right to a reasoned determination. Thus, for example, in *Tatishvili v Russia* (2007) 45 EHRR 52 at §58,

> "The Court reiterate[d] that, according to its established case-law, which reflects a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. Article 6 § 1 obliges courts to give reasons for their judgments...Even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions...."

JUSTIFYING LIMITATIONS ON THE CONSTIUENT ELEMENTS OF A FAIR HEARING

16. Any limitations on these constituent rights will be compatible with a person's right to a fair hearing in the determination of his civil rights and obligations only if (a) they are strictly necessary to achieve a legitimate objective (as the Supreme Court recognised in *Tariq*[16]) and (b) they do not impair the very essence of that person's right to a fair hearing.

17. It is necessary to show that "the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (*Sabah El Leil v France,* no 34869/05, 29 June 2011 (Grand Chamber) at §47).[17] Were it otherwise, the right to a fair hearing would be devoid of content. As the Grand Chamber in *Salduz v Turkey* (no 36391/02, 27 November 2008) held at §51, the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective".[18]

THE ALLEGED JUSTIFICATION FOR CLOSED MATERIAL PROCEEDINGS, THEIR DENIAL OF THE ESSENCE OF THE RIGHT TO A FAIR HEARING AND THE LACK OF SUFFICIENT COUNTERBALANCING MEASURES

18. In *Tariq*, the majority of the UK Supreme Court held that the restrictions on the applicant's right to a fair hearing were necessary in the interests of preventing the disclosure of sensitive material relating to national security (see e.g. Lord Mance, §§38-41; Lord Hope at §75; Lord Brown at §88; Lord Dyson at §159), and that those limitations were in any event "sufficiently counterbalanced" by the employment tribunal's procedures; specifically "scrutiny [of the closed material] by an independent court and the use of special advocates" (Lord Dyson at §147; see also Lord Mance at §§42-59 ; Lord Hope at §§42-59).

(i) Whether the limitations involved in closed material proceedings are strictly necessary in order to prevent the disclosure of sensitive material or to serve some other legitimate aim

19. In the United Kingdom "public interest immunity" arises whenever the public interest in the disclosure of information which is relevant to the determination of an issue in a case is outweighed by the public interest in the information being withheld from use in it. When public interest immunity applies to information it may not be given in evidence and any document to the extent that it contains such information must be withheld from disclosure. Such immunity does not arise merely because disclosure of any information is likely to damage the public interest. It arises only when the balance to be struck in the public interest requires information to be withheld from being disclosed and used in any proceedings. As Lord Dyson explained in *Al Rawi* (supra), the PII process "fully respects the principles of open justice and natural justice" (§49):[19]

> "In many ways, a closed procedure is *the very antithesis of a PII procedure*. They are fundamentally different from each other. The PII procedure respects the common law principles [of open justice and natural justice]. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. *Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms.* The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court. I have already referred to the limits of the special advocate system [§47, emphasis added]."

20. A closed material procedure is accordingly not necessary to prevent the disclosure of any sensitive material that ought not on balance to disclosed in the public interest. The law relating to PII will prevent it. Such a procedure does not exist in ordinary litigation in the United Kingdom (as the decision of the Supreme Court in *Al-Rawi* demonstrates) nor in Employment Tribunals other than in relation to national security (where in any event no such balance apples to whether the information should be disclosed contrary to the requirements of article 6).[20]

21. Given that the law relating to public interest immunity applies equally to all parties, preserves adversarial proceedings and open justice, there is no sufficient justification for (a) abandoning a procedure in which the parties are impartially affected by the law on what information is admissible and under which they each will enjoy rights to adversarial proceedings, equality of arms and open justice and (b) substituting for it a procedure whereby only one party is denied the right to adversarial proceedings and open justice, in which in presenting his case he is put at a substantial disadvantage vis-á-vis another party, only that other party is likely to receive the tribunal's full reasons for its decision, and that party (unlike the other party) may have no effective right of appeal against a decision adverse to him. This does not promote the legitimate aims which might be relied on, namely protection of national security or

fairness, proportionately. There is no question of information which on balance it is not in the public interest to be disclosed being disclosed and it simply creates a manifestly unfair situation as between the parties which would not otherwise exist.

(ii) Whether a closed material procedure impairs the very essence of the right to a fair hearing

22. The "very essence of the right" is a concept which embodies the notion of an irreducible minimum. That irreducible minimum involves a party himself being able to participate effectively in the determination of his own civil rights and obligations on equal terms with others. The very essence of any person's right to fair hearing will be impaired if sufficient information about the substantive case that he has to meet to enable him to challenge it effectively is not disclosed to him (negating the right to adversarial proceedings and equality of arms). It will also be impaired if sufficient reasons are not provided to him to enable him to see whether the tribunal has fairly determined the dispute and whether it has made any material error. As Lord Dyson noted in *Al Rawi*, a closed material procedure "would cut across the fundamental principles of the right to a fair trial *and the right to know the reasons for the outcome*" (§45, emphasis added).

23. JUSTICE submits that the right to a fair hearing and the constituent rights it entails mentioned above and others (such as the right to disclosure of relevant information in the possession of another party) serve four different purposes:
    (1) the rights to adversarial proceedings, to equality of arms and to disclosure of relevant information in the possession of another party make it more likely that the correct decision on the merits will be reached;
    (2) these rights, which enable a party to participate equally in the determination of any dispute, together with the provision of reasons, provide a party with an assurance that there has been a fair hearing and an impartial determination, avoiding the sense of unfairness which exclusion from such participation an excluded party will inevitably have;
    (3) these rights also help to provide the public with confidence that tribunals act fairly and impartially, since those involved are better able to identify when they have not done so; and
    (4) the provision of reasons is also necessary to render practical and effective any right of access to any court of appeal.

    These ends all have an intrinsic value in themselves. They are all undermined by the closed material procedure in issue in this case.

24. The rights to adversarial proceedings, to equality of arms and to disclosure of information in the possession of another party make it more likely that the correct decision on the merits will be reached. In *Al Rawi* (supra), Lord Kerr criticised the government's argument that a court might be determine the accuracy of evidence without the benefit of adversarial argument:[21]

> This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. *To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.* It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial [emphasis added].

25. Moreover, as Baroness Hale stated in *Home Secretary v MB* [2007] UKHL 46, [2008] AC 440, at §57, "doing justice means not only arriving at a just result but arriving at it in a just manner". Thus "the right to be heard (while it may no doubt promote accurate decision-making) is an end in itself: it is simply the doing of justice, which requires no utilitarian justification": per Laws LJ *R (Khatun and Others) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at §27. Accordingly, as the ECtHR has recognised, it is irrelevant whether the denial of the right to comment on material submitted to influence a tribunal's determination and taken into account by it (contrary to the right to adversarial proceedings) in fact prejudices a party: it is for that party to decide whether or not to comment on such material. To deny that right is to deny that party's right to participate properly in the proceedings. As the Court put it, for example, in *Milatova v Czech Republic* (2007) 45 EHRR 18:

> "65. The Court notes that the observations in question constituted reasoned opinions on the merits of the applicants' constitutional appeal, manifestly aiming to influence the decision of the Constitutional Court

by calling for the appeal to be dismissed....The Court does not need to determine whether the omission to communicate these documents caused the applicants prejudice; the existence of a violation is conceivable even in the absence of prejudice....It is for the applicants to judge whether or not a document calls for their comments....The onus was therefore on the Constitutional Court to afford the applicants an opportunity to comment on the written observations prior to its decision.

66. Accordingly, *the procedure followed did not enable the applicants to participate properly in the proceedings* before the Constitutional Court and thus deprived them of a fair hearing within the meaning of Article 6 § 1 of the Convention. There has therefore been a violation of that provision." [emphasis added]

26. As the Court explained in *Vanjak v Croatia* (no 29889/04, 14 January 2010) at §55, for example,

> "*What is particularly at stake here is the applicant's confidence in the workings of justice*, which is based on, inter alia, the knowledge that he had the opportunity to express his views on every document relied on in the subsequent judgment....Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, and to the prominent place the right to a fair administration of justice holds in a democratic society within the meaning of the Convention, the Court considers that any restrictive interpretation of Article 6 in this respect would not correspond to the aim and the purpose of that provision." [emphasis added]

27. The same is true of the right to equality of arms. Thus, for example, in *AB v Slovakia* (supra), the ECtHR emphasised in the context of this right also that "importance is to be attached to, inter alia, the appearance of the fair administration of justice" and, accordingly, that "the Court does not consider it necessary to determine whether the applicant suffered actual prejudice in this respect as such conduct was, in the circumstances of the case, incompatible with the fair administration of justice": see at [55], [56], [61].

28. The right to adversarial proceedings and the right to reasons for the determination also help provide the parties and the public with confidence that there has been a fair hearing and an impartial determination by enabling it to be seen how the parties' cases have been dealt with and by providing a protection against arbitrariness and abuse. Further the provision of reasons is also necessary to render practical and effective any right of access to any court of appeal. Thus, for example, in *Tatishvili v Russia* (2007) 45 EHRR 52 at §58:

> "The Court reiterates that, according to its established case-law, which reflects a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. Article 6 § 1 obliges courts to give reasons for their judgments...Even though a domestic court has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions.... A further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice.."

29. What is at stake is not merely the subjective perception of each party that they have been treated fairly, whatever the outcome, but also the intrinsic value of the court as a just institution; a body that acts justly even though both parties may remain unhappy with the outcome. In the longer term, the perception that courts are no longer places that treat parties fairly is likely to be profoundly damaging to the fair administration of justice and, ultimately, the rule of law itself. As noted in *Borgers v Belgium* (12005/86, 30 October 1991), the development of the Court's jurisprudence on the principle of equality of arms was driven by "the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice" (§24). Lord Neuberger observed, in *Al Rawi* in the Court of Appeal ([2010] EWCA Civ 482 at §56, that:

> While considering practical considerations, it is helpful to stand back and consider not merely whether justice is being done, but whether justice is being seen to be done. If the court was to conclude after a hearing, much of which had been in closed session, attended by the defendants, but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants, but not the claimants or the public, that the claims should be dismissed, *there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done*. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation

would be damaged by such a process, *but the damage to the reputation of the court would in all probability be even greater* [emphasis added].

30. In considering any restrictions imposed in a closed material procedure on the rights that a fair hearing entails and whether, given any counterbalancing measures, therefore, they impair the "very essence of the right" in question, it is necessary to bear in mind the various purposes which these relevant rights serve and which give them value.

(iii) Independent scrutiny by a court as a counterbalancing factor

31. Contrary to the view expressed by the majority in *Tariq*, JUSTICE submits that the scrutiny of an independent and impartial cannot properly be regarded as a "counterbalancing factor" for the lack of effective disclosure. On the contrary, the involvement of an independent and impartial tribunal is something that is required in any event under article 6(1). What is required in addition is a fair hearing before it. As the Court held in *Mirilashevili v Russia* (no 6293/04, 11 December 2008), "the mere involvement of a judge does not suffice" (§198). In *Uzuckauskas v Lithuania* (no 16965/04, 6 July 2010) and *Pocius v Lithuania* (no 35601/04, 6 July 2010), the Court similarly rejected the suggestion that judicial scrutiny was sufficient to counter-balance the denial of any opportunity for the applicants to know or respond to the closed material in question (data held on a law enforcement database).

32. The scrutiny of the trial judge was cited by the government in *Al Khawaja and Tahery v United Kingdom* (nos. 26766/05 and 22228/06, 15 December 2011) as one of two 'counterbalancing factors' in relation to the admission of untested hearsay against the accused (the other was a warning to the jury given by the trial judge).[22] The Grand Chamber, however, concluded that neither safeguard "whether taken alone or in combination, could be a sufficient counterbalance to the handicap under which the defence laboured", namely his inability to test the truthfulness and reliability of the hearsay statement by way of cross-examination (§162).

33. Nor is the scrutiny of a court, however diligent, sufficient to overcome the inability of a party to give effective instructions to the special advocate because he does not have sufficient details of the case against him. The court is in no better position than the special advocate to discern what answer the excluded party might have in response to the closed material. Indeed, as Lord Kerr warned in *Al Rawi*, "[e]vidence which has been insulated from challenge may positively mislead" (§ 93), leading a court to draw conclusions from evidence that has not been subjected to genuine adversarial challenge. As Lord Kerr said in his dissent in *Tariq* (§118):

> A function of the counterbalancing measures is to ensure that the very essence of the right is not impaired. It is, I believe, important to have a clear understanding of what is meant by the essence of the right. *If equality of arms lies at the heart of a fair trial, the essence of the right must surely include the requirement that sufficient information about the case which is to be made against him be given to a party so that he can give meaningful instructions to answer that case* [emphasis added].

Nor has the tribunal in this case (or generally in an adversarial system) the resources to investigate and to test for itself the case advanced by the other party.

(iv) The use of special advocates as a counterbalancing factor

34. Just as judicial scrutiny cannot properly be regarded as a 'counterbalancing factor', so too JUSTICE submits that the use of special advocates is plainly incapable of offsetting or counterbalancing the manifest unfairness of closed proceedings in the absence of sufficient disclosure to the excluded party. The shortcomings of the special advocate system (§94) have been extensively documented in the reports of the Joint Committee on Human Rights,[23] by JUSTICE's previous intervention in *A and others v United Kingdom* and its 2009 report *Secret Evidence*, and by the most recent testimony of the special advocates themselves.[24] In a collective response to the UK government's Green Paper on Justice and Security in December 2011, the "overwhelming consensus" of serving special advocates was that:

> The use of [special advocates] may attenuate the procedural unfairness entailed by [closed material procedures] to a limited extent, but even with the involvement of [special advocates][closed material procedures] remain fundamentally unfair. That is so even in those contexts where Article 6 of the ECHR requires open disclosure of *some* (but not all) of the closed case and/or evidence [emphasis in original].

35. Among the several inherent defects of the special advocate system is the inability of special advocates to call witnesses in closed proceedings, particularly expert witnesses who may be able to rebut the government's analysis of sensitive intelligence material. In his analysis of the acceptability of a special advocate procedure in *Tariq*, Lord Mance dismissed the applicant's complaint that special advocates were unable to call expert evidence, stating that he could see "no reason why a special advocate may not, where appropriate, take steps to call factual or expert evidence during the closed phase" (§ 58). However, Lord Mance made no reference to the earlier observation by Lord Bingham in *Roberts v Parole Board* [2005] UKHL 45 at §18:

> even if a [special advocate] is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the [defendant] or divulge any of the sensitive material to the witness.

As Lord Bingham correctly noted, the inability of special advocates to call witnesses is not a formal prohibition but a practical one: any independent witness would lack the necessary security clearance to view the closed material nor has the government ever indicated that it would be prepared to provide such clearance. As the special advocates themselves noted collectively in December 2011:[25]

> We are strongly of the view that our inability to challenge closed material more rigorously is not the result of a lack of training. Rather, it is *the inevitable result of our inability to take instructions, together with the practical inability to call any evidence, expert or otherwise*, and the nature of that evidence (which may be second or third hand, and whose primary source may be unidentifiable) [emphasis added].

(v) Conclusion

36. The defects mentioned above mean that the first of the four purposes (identified in §24 above) that the constituent elements of a fair hearing serve (namely making it more likely that a correct decision on the merits will be reached) is unlikely to be achieved and may be harmed by the two counterbalancing measures relied on by the Supreme Court. But, even if it did, they do not mitigate the denial of the other values to which article 6 gives effect. They will not avoid a party considering, not unreasonably, that the procedure for the determination of his rights and obligations from which he has been excluded from participating is unfair. They will not provide the public with confidence that there has been a fair hearing and an impartial determination. They will not render the exercise of any right of appeal by the excluded party himself practical and effective.

37. Given the existence of PII, the alleged justification for a closed material procedure must be that a party will suffer a disadvantage if information, which it is not in the public interest to be disclosed, cannot be relied on. If a fair hearing can nonetheless be had, there can be no justification for a closed material procedure. If no fair hearing can be had without disclosure of such information, however, then the dispute is not fairly justiciable and its determination should be stayed. As the decision of this Court in *Carnduff v UK* (2004) App No 18905/02 shows, that approach is compatible with article 6: see also *Klass v Germany* (1979-80) 2 EHRR 214 at §75 (quoted below). The answer is not to accept a procedure which denies the very essence of the right to a fair hearing as being compatible with article 6.

THE APPLICATION OF ARTICLE 6(1) TO SURVEILLANCE AND VETTING CASES

38. In *Tariq*, the majority of the UK Supreme Court rejected the argument that article 6 required an irreducible minimum standard of disclosure in all cases to which it applies, regardless of context. In doing so, it placed special reliance on three cases - *Leander*, *Esbester* and *Kennedy* [26]

39. JUSTICE submits, however, that neither *Leander* or *Esbester* can properly be taken as support for the proposition that article 6(1) does not require an irreducible minimum standard of disclosure in any proceedings to which it applies. In *Leander* (9248/81, 10 October 1983 (Commission)), the applicant had originally claimed that the refusal of security clearance that prevented him from working at the Naval Museum breached his right to a fair hearing under article 6(1) because he had not been given any opportunity to contest the underlying information (material held in a police register) that gave rise to the assessment that he was a security risk. However, the Commission rejected this as incompatible *ratione materiae* on the basis that complaints concerning "access to or dismissal from the civil service falls outside the scope of article 6(1)" (p83) and that therefore no civil right was engaged by the proceedings. In its subsequent judgment (1987) 9 EHRR 433, therefore, the Court was not required to consider the applicant's complaint under article 6.

40. Similarly in *Esbester*, the applicant did not raise a complaint under article 6 nor did the Commission otherwise consider whether the lack of disclosure before the Security Services Tribunal otherwise breached the requirements of procedural fairness. His complaint under article 13 was rejected by the Commission on the basis that he had no arguable claim that his Convention rights had been violated. Insofar as *Leander* and *Esbester* support the proposition that vetting procedures involving secret surveillance may be compatible with the requirements of article 8 so long as certain conditions are met (including the provision of adequate safeguards), neither decision ever addressed the question of whether such procedures were also fair within the meaning of article 6(1).

41. Indeed, as the Court made clear in *Klass and others v Germany* (1978) 2 EHRR 214, the reason why a surveillance decision does not attract the ordinary requirements of fairness is because the guarantees of article 6(1) are simply inapplicable for 'as long as it remains validly secret':

> the question whether the decisions authorising such surveillance under the [German statute] are covered by the judicial guarantee set forth in Article 6 … must be examined by drawing a distinction between two stages: that before, and that after, notification of the termination of surveillance. *As long as it remains validly secret, the decision placing someone under surveillance is thereby incapable of judicial control on the initiative of the person concerned, within the meaning of Article 6 … as a consequence, it of necessity escapes the requirements of that Article* [emphasis added].

This position was reaffirmed in *Association for European Integration and Human Rights and another v Bulgaria* (no 62540/00, 28 June 2007), §§104-107.

42. In *Kennedy*, by contrast, the Court went beyond the ruling in *Klass* (see §§ 177-179) and held that, assuming that article 6 was applicable, the procedures of the Investigatory Powers Tribunal ('IPT') were compatible with article 6, notwithstanding that the applicant had no right to a hearing, no right to disclosure of relevant evidence, no right to know let alone cross-examine the testimony of adverse witnesses, and no right to any kind of reasons. The Court not only accepted that the need to keep secret sensitive and confidential information justified the restrictions on the right to a fair hearing (§ 186), but held - in light of this interest - that the sweeping restrictions on the right to be heard, to equality of arms and an adversarial hearing, to knowledge of the other party's case, and to a reasoned decision were not disproportionate and did not impair the very essence of the applicant's right to a fair hearing (§§187-190).

43. JUSTICE respectfully submits that the Court's conclusions in *Kennedy* concerning article 6(1) are: (i) incompatible with its longstanding jurisprudence on the justiciability of secret surveillance decisions, starting with *Klass*; and (ii) wholly at odds with its previous case law concerning the essential elements of a fair hearing. Moreover, it is likely to exert a baleful influence in other areas of the law relating to a fair hearing, as the judgments of the majority in *Tariq* demonstrate.

44. In particular, although JUSTICE accepts that the context of the proceedings and the consequences of what is at stake for each party can be relevant to determining what fairness requires, it submits that this principle cannot come at the expense of the very essence of the right to a fair hearing. As Lord Kerr said in his dissent in *Tariq*, the right of each party to know and effectively test the case against him "surely captures the essence of the right" and that essence "cannot change according to the context in which it arises" (§119):

> Whether a hearing should be conducted in private or in open session; whether information about the case against an individual should be provided by way of full disclosure or by redacted statements or in the form of a summary or gist; whether witnesses should be anonymised – all of these are variables to which recourse may be had in order to reflect the context in which the requirements of article 6 must be examined. *But if the essence of the right is to be regarded (as I believe it must be) as the indispensable and necessary attributes of the right as opposed to those which it may or may not have, its essence cannot alter according to the circumstances in which it falls to be considered* [§ 119, emphasis added].

As he went on to conclude, "there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made" (§134). JUSTICE further submits that Lord Kerr was correct to conclude that "the decision in *Kennedy* ought to have been made on the basis that article 6 was not engaged because the issues that the case raised were simply not justiciable" (§128).

45. More generally, JUSTICE would draw the Court's attention to the broader context of its decisions concerning the use of closed proceedings:

(i) In February 2009, the report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights expressed its concern at the growing use of intelligence material as evidence in criminal and civil proceedings, the corresponding restrictions imposed on the rights of parties to know the evidence against them, and the consequent damage to fair trial rights and the role of the courts in promoting the accountability of executive action.[27]

(ii) In June 2009, JUSTICE published *Secret Evidence*, a report which detailed the growth of closed proceedings in UK courts and tribunals since 1997. Among other things, it noted that closed proceedings are now available to be used in a wide range of statutory proceedings including deportation hearings before the Special Immigration Appeals Commission, control order proceedings, parole board cases, asset-freezing applications, pre-charge detention hearings in terrorism cases, employment tribunals and planning tribunals.

(iii) In October 2011, JUSTICE published *Freedom from Suspicion: Surveillance Reform for a Digital Age,* a report detailing the use of surveillance powers under the Regulation of Investigatory Powers Act 2000 (RIPA). Among other things, it noted that since RIPA came into force in October 2000, there have been approximately 2.8 million surveillance decisions taken by public officials under the Act. Of these, fewer than 5000 (or 0.16%) were subject to prior judicial authorisation. The overwhelming majority of surveillance decisions were subject to only ex post facto judicial oversight by retired judges working apparently part-time. Despite the high volume of surveillance decisions between 2000 and 2011, the Investigatory Powers Tribunal dealt with only 1,100 cases in the past decade and has upheld only ten complaints, five of which come from members of the same family. The report concluded that the Tribunal was "simply inadequate as a mechanism for protecting individuals against excessive or unnecessary surveillance by public bodies".[28]

(iv) On 19 October 2011, the government published its Green Paper on Justice and Security,[29] which proposed the statutory extension of closed material proceedings into civil proceedings generally. On 19 June 2012, the Justice and Security Bill received its Second Reading in the House of Lords.[30]

JUSTICE submits that the increasing use of both surveillance powers and closed proceedings in general makes it all the more important for the Court to state clearly the requirements of the right to a fair hearing when it is contended that closed material proceedings may satisfy them, having particular regard to the role of article 6(1) in guaranteeing the right of each party to effective participation in a fair hearing.

CONCLUSION

46. The use of closed proceedings in the Employment Tribunal as permitted by the Supreme Court involves drastic unfairness to the excluded party in the determination of his civil rights and obligations. These include prohibiting that party from being present at the closed hearing, denying him knowledge of what the case against him is, denying him the opportunity to hear and comment upon the closed evidence, and denying him reasons for any adverse decision.

47. Neither the involvement of a judge nor the use of special advocates are sufficient to overcome the manifest unfairness of such closed proceedings, unless *inter* alia the excluded party is provided with sufficient information concerning the case he has to meet (and, where necessary, the supporting evidence) in order to give effective instructions to the special advocate to enable him to challenge it. For the right of each party to know the case and the evidence against them it is not an incidental feature of a fair trial but an essential part of the right itself. Although the formalities of a fair hearing may vary according to the context, its essential requirements do not.

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[1] Pursuant to Art.36(2) and Rule 44(2).
[2] See Lord Mance at §§ 65-69; Lord Hope at § 83; Lord Brown at § 88; Lord Dyson at § 159. At § 163, Lord Phillips, Lady Hale and Lord Clarke stated their agreement with the judgments of Lords Hope, Brown, Mance and Dyson. Lord Rodger died before judgment was given but had indicated his agreement with the judgments of Lord Mance and Lord Brown.
[3] See especially Lord Mance at §§ 28-36; Lord Brown at § 89; Lord Dyson at §§ 145-158.
[4] Art 15(1) ECHR.
[5] See e.g. Lord Hope's reference to "the fundamental and absolute right to a fair trial" in *HM Advocate v P (Scotland))* [2011] UKSC 44 at § 14; and Lord Dyson in *Tariq* at § 139: "The article 6 right to a fair trial is absolute".
[6] "The key principle governing the application of Article 6 is fairness": *Zagorodnikovv Russia* (no 66941/01, 7 June 2007), § 30; See also e.g. the judgment of the US Supreme Court in *Lisenba v. California*, 314 U.S. 219 (1941) at 236 per Roberts J: "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice"; and *Maharaj v. Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) at 399 per Lord Diplock: "[t]he fundamental human right is not to a legal system that is infallible, but to one that is fair".
[7] Similarly, "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 restrictively" (*Perez v France* (2004) 40 EHRR 909 (Grand Chamber), § 64.
[8] '[The accused man] must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them']. See also the decision of the Canadian Supreme Court in *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350 at § 53 per McLachlin CJ: '[l]ast but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it'.
[9] See e.g. the decisions of the US Supreme Court *Windsor v McVeigh* (1876) 93 US 274 at 277 per Field J: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal"; *Caritativo v. People of State of California* 357 US 549 (1958) per Frankfurter J: "*Audi alteram partem* - hear the other side! - a demand made insistently through the centuries, is now a command, spoken with the voice of the due process clause of the 14th Amendment, against state governments, and every branch of them - executive, legislative, and judicial - whenever any individual, however lowly and unfortunate, asserts a legal claim"; and the decision of the Canadian Supreme Court, *LLA v AB* [1995] 4 SCR 536 at 27 per L'Heureux-Dubé: "The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions".
[10] 'Qui statuit aliquid parte inaudita altera, aequum licet statuerit, haud aequus fuit', *Medea,* 199-200.
[11] 'A report of the Spanish Grievances', *Works of Francis Bacon*, vol 5 (1826).
[12] See further *A and others,* § 209. In *Othman (Abu Qatada) v United Kingdom* (no 8139/09, 17 January 2012), the Court rejected the applicant's argument that the non-disclosure of certain material relating to his safety if returned to Jordan breached his right to an effective remedy under article 13, taken in conjunction with the prohibition against torture under article 3. The use of closed material in Othman's case, the Court found, concerned "issues of a very general nature" - namely, the effectiveness of assurances in his case (§ 224). Even if it had been disclosed to Othman, the Court found, there was "no reason to suppose" that "he would have been able to challenge the evidence in a manner that the special advocates could not"(ibid). In other words, it was not a case where the closed material contained allegations against him.
[13] This approach was confirmed by Advocate General Sharpston in her opinion in *POMI,* C-27/09P, handed down on 14 July 2011, when she describes the disclosure considered necessary in *A v UK* by the Grand Chamber as a "irreducible minimum requirement" in cases involving a freezing order (§§244 – 245)
[14] Contrary to the approach of the Supreme Court in *Tariq*: see Lord Mance at §27. Such an approach implausibly assumes that it is possible (a) to rank the importance of the outcome of any particular proceeding along a spectrum; (b) to devise a spectrum of requirements that a fair hearing may entail; and then (c) to correlate the ranking in any case with a point on that spectrum of requirements. On Lord Mance's approach, since the outcome of the same determination may have a different importance to different individuals, different individuals could be entitled to different degrees of fair hearing about the same matter - an arbitrary and patently unfair result. What fairness requires is not to be determined by reference to the importance of the outcome of any determination as opposed to what is required to secure a party a fair hearing in that determination.
[15] See also e.g. *Jasper v United Kingdom* (2000) 30 EHRR 441 (Grand Chamber) at §51: "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence".
[16] See per Lord Mance at §36.
[17] See also e.g. *Osman v United Kingdom* [1998] EHRR 101 (Grand Chamber) at §147: the right of access to a court under article 6(1) "is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"; *Salov v Ukraine* (no 65518/01, 6 September 2005) at §78: In deciding whether there has been a violation of Article 6, the Court must consider whether the proceedings in their entirety, including the appeal proceedings, as well as the way in which evidence was taken, were fair"; and Lord Bingham in *R v Davies* [2008] UKHL 36 at § 26(2): "If, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised".

[18] See also e.g. *Vanjak v Croatia* (no 29889/04, 14 January 2010) at §55: "What is particularly at stake here is the applicant's confidence in the workings of justice, which is based on, inter alia, the knowledge that he had the opportunity to express his views on every document relied on in the subsequent judgment....Having regard to the purpose of the Convention, which is to protect rights that are practical and effective, and to the prominent place the right to a fair administration of justice holds in a democratic society within the meaning of the Convention, the Court considers that any restrictive interpretation of Article 6 in this respect would not correspond to the aim and the purpose of that provision".

[19] In *Jasper v United Kingdom* (2000) 30 EHRR 441, the Grand Chamber held at §51 that "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that *both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party*. In addition Article 6(1) requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused [emphasis added]". It went on to note that - as with the other constituent rights under article 6(1) - the right to disclosure of relevant unused material was not absolute and that it may be necessary to restrict such disclosure in order to safeguard an important public interest "such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused" (§ 53), so long as the restrictions were "strictly necessary", complied "as far as possible" with "the requirements to provide adversarial proceedings and equality of arms", and was "sufficiently counterbalanced" by "adequate safeguards to protect the interests of the accused." Applying this test to the facts of the case, the Grand Chamber in *Jasper* concluded that the decision of the trial judge to withhold certain relevant material on the grounds of public interest immunity ('PII') did not violate the applicant's right to a fair trial under article 6. JUSTICE submits that there no sensible analogy between the withholding of relevant unused material on PII grounds, in circumstances where the parties will otherwise be on an equal footing and the right to adversarial proceedings respected, and the crippling restrictions involved in closed proceedings, in which one party is altogether prohibited from the opportunity to know and to comment upon the evidence put forward by the other as part of the court's substantive determination of the issues.

[20] When assessing whether the refusal of a tribunal to order disclosure by one party to another of information which that party does not wish to disclose, the ECtHR will examine inter alia whether it weighed the public interest in non-disclosure (for example national security) against the interest in disclosure: a rule that prohibits a tribunal from doing so is incompatible with article 6: cf *Mirilashvili v Russia* (supra) at §66, §§114-118, and §§200-209 esp §205.

[21] See further Lord Kerr at § 93: "However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable".

[22] See e.g. § 100: " The trial judge was required to subject the need to admit the evidence to rigorous scrutiny".

[23] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (HL 157/HC 790: 30 July 2007); and *Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2010* (HL Paper 64/HC 395, 26 February 2010).

[24] Response of Special Advocates to the Justice and Security Green Paper (16 December 2011); Special Advocates' Memorandum on the Justice and Security Bill submitted to the Joint Committee on Human Rights (14 June 2012)

[25] Response of Special Advocates to the Justice and Security Green Paper (16 December 2011), § 30(i).

[26] See e.g. Lord Mance at §36 and later at §68 ("in the light of the clear line of jurisprudence culminating in the Court's decision in Kennedy"; Lord Brown at §89 (the applicant's argument "is now clearly belied by a series of Strasbourg decisions culminating most recently and most decisively in *Kennedy*"); and Lord Dyson at §158: "'there is a clear line of authority to support the proposition that, *in surveillance and security vetting cases,* an individual is not entitled to full article 6 rights if to accord him such rights would jeopardise the efficacy of the surveillance or security vetting regime itself" [emphasis in original]).

[27] *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists, February 2009), see especially §3.2.4.

[28] § 364.

[29] Cm 8194.

[30] See e.g. response of the Equality and Human Rights Commission to the Justice and Security Green Paper, 9 January 2012 http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/58_Equality%20and%20Human%20Rights%20Commission.pdf