Case No: UKSC 2010/0106; 2010/0108

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)(ENGLAND)

BETWEEN:

THE HOME OFFICE

Appellant/Respondent/Defendant

and

KASHIF TARIQ

Respondent/Cross-Appellant/Claimant

and

JUSTICE (1)

LIBERTY (2)

Interveners

CASE FOR THE INTERVENERS, JUSTICE AND LIBERTY

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INTRODUCTION

1. This Case addresses the general issues raised by these appeals in relation to article 6 of the ECHR. In order to avoid duplication it does not deal with the issues raised concerning EU law as such or whether there are sufficient structural guarantees to secure the apparent independence of the special advocate.

2. The first issue which was agreed between the Home Office and Mr Tariq is ambiguously framed. It is

> "whether the Employment Tribunal *can* order *a* closed material procedure. In particular:..whether *the* closed material procedure is compatible with Article 6 of the ECHR" (emphasis added).

This formulation is ambiguous in two main respects: (i) it fails to specify what "a closed material procedure" may comprise; and (ii) it is unclear whether the issue relates to the procedure which has been ordered and is applicable in this case or to such procedures more generally.

3. For present purposes "a closed material procedure" may be defined as one in which information which is available to one party and to the court or tribunal is denied to another party.

4. It is obvious that information which is thus denied to a party may be of different kinds. For example, it may be information about (i) the contentions of the other party; (ii) the evidence of the other party; (iii) other potentially relevant evidence which may be available; and (iv) the reasons for a decision of the court or tribunal. Furthermore the extent to which such information is denied may equally vary. It may be denied wholly or in part. Moreover the significance of the information denied in the context of the issues and other information available in the case may also vary.

5. It is thus generally unilluminating to ask whether an Employment Tribunal can order a closed material procedure under rule 54 of the Employment Tribunal Rules of Procedure ("the ET Rules"). Under that rule such a tribunal is empowered, for example, to "take steps to conceal the identity of a particular witness" if it considers it expedient to do so in the interests

of national security: see rule 54(1)(d) and (2)(a). This of itself alone involves a closed material procedure: information about the identity of that witness may be denied to a party whilst it is available to the other party and to the Tribunal. Of itself this need not be incompatible with the requirements of article 6(1). Even in the determination of criminal charges, it may not necessarily be incompatible with article 6 to conceal the identity of a witness if that is necessary for a good reason (such as to prevent reprisals or to preserve his or her usefulness as a police agent), provided that that witness gives evidence in the presence of the accused or his counsel and may be cross examined by them and provided also that any conviction is not based either solely or to a decisive extent on such anonymous statements: see ***Doorson v Netherlands*** (1996) 22 EHRR 330 at [67], [72]-[76], ***Van Mechelen and Others v Netherlands*** (1998) 25 EHRR 647 at [56]-[59], [62]-[64][1]. It may thus be compatible for an Employment Tribunal to take steps to conceal the identity of a witness. But it would be absurd on that basis to contend that whatever closed material procedure an Employment Tribunal may follow is compatible with article 6(1) of the ECHR irrespective of what information a party may be denied or its significance in the context of the issues and other information available in the case.

6. For this reason amongst others, general assertions by the Home Office in its Case (for example at [45(1) and [46]) that “a closed material procedure is in principle compatible with article 6" or that “article 6 ECHR has already been held to permit closed material procedures in a wide range of contexts” (even if that assertion was true, which it is not) also do nothing to show whether any particular closed material procedure is compatible with article 6(1). Moreover such general assertions do nothing to assist in determining how that question is to be answered.

7. It also follows that the only sensible question to be asked is whether the closed material procedure which has been ordered and which falls to be applied under rule 54 of the ET Rules in this case is compatible with article 6(1).

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[1] The Home Office’s assertion (in paragraph 19(1) of its Case) that these two cases show “that the use of statements made by anonymous witnesses to *found* a criminal conviction was not in principle incompatible with Article 6" is thus, at best, highly misleading. The requirement that such statements must not form the sole or decisive basis for a conviction has been reiterated, for example, by the Grand Chamber in ***A and others v United Kingdom*** (2009) 49 EHRR 29 at [208] and in ***Pervushin v Estonia*** (2009) Sept 29th App No 54091/08.

8. The second issue agreed between the Home Office and Mr Tariq looks at only one element of the procedure which has been ordered in this case, namely the declaration by the Employment Appeal Tribunal that article 6 of the ECHR requires Mr Tariq to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively. It is an unfortunate aspect of the presentation of these appeals that the parties appear to be posing a false choice for the Supreme Court, namely that, if a party may be denied any information which is available to the other party and the tribunal regardless of what it may be under a closed material procedure, then the only question if article 6 is to be complied with is whether this information has to be provided to that party.

9. Justice and Liberty's case is that:

(1) in any case which is justiciable in the circumstances, a procedure which limits the rights to adversarial proceedings, to equality of arms and to the provision of reasons for the decision will be compatible with a party's right to a fair hearing in the determination of his civil rights and obligations only if:
   (i) each limitation is strictly necessary to achieve a legitimate objective;
   (ii) sufficient information about the substantive case which that party has to meet is disclosed to enable him effectively to challenge it; and
   (iii) sufficient reasons for the determination are provided to enable it to be seen whether the tribunal has fairly heard the dispute and to enable any material error in the determination to be detected and any right of appeal to be effectively exercised.

(2) the Home Office has not shown that the restrictions on Mr Tariq's rights to adversarial proceedings, to equality of arms and to open justice necessarily involved in the closed material procedure in this case are strictly necessary; but in any event

(3) without the disclosure to him of sufficient information to enable him effectively to challenge the case against him and of sufficient reasons for the decision, the procedure to be followed in this case would not be compatible with Mr Tariq's rights to a fair and public hearing, with his right to have judgment delivered publicly in his case and with his right of access to the Employment Appeal Tribunal.

THE GENERAL APPROACH TO ASSESSING WHETHER A CLOSED MATERIAL PROCEDURE ADOPTED IN THE DETERMINATION OF A PERSON'S CIVIL RIGHTS AND OBLIGATIONS IS COMPATIBLE WITH HIS RIGHTS UNDER ARTICLE 6(1) OF THE ECHR

(a) the general approach of the Home Office

10. In its Case the Home Office assumes that the only relevant right in article 6(1) of relevance in this case is Mr Tariq's right to a fair hearing.

11. It asserts (at [69]) that the case law of the ECtHR emphasises "that the right to a fair hearing is not absolute, that the ingredients of procedural fairness are context-dependent and that the individual's rights are to be balanced against the community's interests". Specifically in terms of what are described as "the constituent elements of a fair process", the Home Office contends (at [11]) that they are "not absolute or fixed"; (at [14]) that they "can, and should take account of what is at stake both for the individual concerned and for the general community"; and (at [16]) that, accordingly, there is thus a "spectrum" so that "very considerable caution is needed before concluding that an ingredient considered necessary in a context at one end of the spectrum (eg criminal or deprivation or severe restriction of liberty cases) is also necessary in a context at the other end of the spectrum (eg a civil claim for damages, or a discrimination claim arising out of the process of security vetting itself, or a judicial review)."

12. The Home Office in its Case appears to assume that the only "ingredient" of a fair hearing that a closed material procedure may impair generally or in this case is "a right to disclosure": see its Case at [17], [18], [21], [48], [56]. Its Case is in effect that, whatever the extent of non-disclosure may be, a "fair process" can be achieved, at least at some point on this "spectrum", merely by the involvement of an independent court and of a special advocate and that at least in this case, whatever the extent of non-disclosure may be, it is justified given these two "counterbalancing factors" (on the basis that the Home Office would otherwise be unable to defend itself without disclosing information contrary to the interests of national security).

13. It is submitted that the Home Office's approach is flawed in a number of major respects:

(1) Mr Tariq has rights under article 6(1) other than his right to a fair hearing that

are impaired by the closed material procedure which has been ordered and which falls to be applied under rule 54 of the ET Rules in this case, namely his right to a "public hearing", his right to judgment (including the reasons for it) being pronounced publicly and his right of access to the court; but

(2) in any event Mr Tariq's right to a fair hearing is absolute: it is not to be interpreted restrictively and it is not to be sacrificed for the sake of expedience;

(3) a fair hearing presupposes the right to adversarial proceedings and to equality of arms in all cases (rights which the Home Office's Case never mentions) and it also implies in some cases certain other rights (such as a right to the disclosure of relevant evidence that another party may have but on which it does not propose to rely);

(4) although the full extent of such rights may be limited if strictly necessary to achieve a legitimate aim, (as the Home Office accepts) such limitations may not impair the very essence of the right to a fair hearing;

(5) the Home Office's approach, however, contains no conception of what the essence of that right is or how it may be identified and it will denude a fair hearing of its very essence.

(b) the right to a fair hearing

i. whether the right to a fair hearing is an absolute right and what the relevant question is

14. Unlike certain other Convention rights (such as some of those contained in articles 8 to 11 of the ECHR), the right to a fair hearing is non-defeasible. Similarly, although article 6(1) itself provides in terms that the press and the public (but not a person whose civil rights or obligations is being determined) may be excluded from any trial that may be held in the interests *inter alia* of national security, it does not permit that a person's right to a fair hearing to be curtailed for that purpose. As the ECtHR stated in ***Ramanauskas v Lithuania*** (2010) 51 EHRR 11 at [53], "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." Subject only to derogation in the case of a public emergency under article 15 of the ECHR, a person's right to a fair hearing in the determination of his civil rights and obligations is an absolute right. Thus, as Lord Hope rightly pointed out in ***Brown v Stott*** [2003] 1 AC 681 at p719e, "the court has

consistently recognised that...the right to a fair trial is absolute in its terms and the public interest can never be invoked to deny that right to anybody under any circumstances". Similarly, as Lord Brown stated in ***Home Secretary v MB*** [2007] UKHL 46, [2008] 1 AC 440, at [91], the right to a fair hearing under article 6 "seems to me not merely to be an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control."

15. The Home Office is accordingly wrong to contend in its Case (at [69]) that "the right to a fair hearing is not absolute"[2].

16. The only relevant question in respect of this right is thus whether the relevant procedure for the determination of a person's civil rights and obligations provides that person with a "fair hearing". In considering what that involves, as the ECtHR has also 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) March 4th App N° 41784/98 at [54].

ii. what the right to a fair hearing involves

17. As the ECtHR has stated, for example, in ***Mirilashevili v Russia*** (2008) Dec 11th App N° 6293/04 at [157] "a fair trial presupposes adversarial proceedings and equality of arms". Accordingly the right to adversarial proceedings and the right to equality of arms are both rights which a fair hearing entails in both civil and criminal proceedings.

18. "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].

19. As the Court recently reiterated, for example in ***Vanjak v Croatia*** (2010) Jan 14 App N° 29889/04 at [52], "independently of whether the case is a civil, criminal or disciplinary one, the right to adversarial proceedings has to be complied with. That right means in principle the

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[2] This is also the general result of its analysis. The Home Office also states in its Case (at [11]) that "the right to a fair *process* is unqualified", but the entitlement is in fact to a fair *hearing*.

opportunity for the parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced or observations submitted, with a view to influencing the court's decision."

20. The reasons why the concept of a "fair hearing" presupposes both of these rights are obvious. A procedure may determine a person's civil rights and obligations correctly without hearing the parties at all. But "a procedure whereby civil rights are determined without ever hearing the parties' submissions cannot be considered to be compatible with Article 6(1)": ***Georgiadis v Greece*** (1997) 24 EHRR 606 at [40]. As Dyson LJ (as he then was) has stated, in a passage approved by the Appellate Committee in ***R (Wright) v the Secretary of State for Health*** [2009] UKHL 3 [2009] 1 AC 739 at [25] and [28], the denial of the right to make representations is "not a mere formal or technical breach. It is 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". 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 that person's own case without reference to another person's case. It necessarily involves the right to be heard about the merits or deficiencies of any case which he has to meet (who need not be addressed to the tribunal by another party but may be advanced by a person seeking to assist it). A party's case necessarily involves his response to others'. The right to adversarial proceedings is thus necessarily involved in the right to a *hearing*.

21. Similarly if a hearing is to be *fair*, the parties should be treated equally. A party will not be if he or she is not 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.

22. By denying a party information which is available to another party and to the tribunal a closed material procedure may impair the right to adversarial proceedings and it may, if it places that party at a substantial disadvantage *vis-á-vis* an opponent, infringe his right to equality of arms.

23. A fair hearing may also entail certain other rights.

(1) There may be a right to the disclosure of relevant information possessed by another party. In criminal cases it imposes an obligation on the prosecution to

disclose to the defence all material evidence in their possession for or against the accused. This right is one additional to the rights to adversarial proceedings and to equality of arms in the direct determination of a criminal charge or of a person's civil rights and obligations. But those rights also apply in procedural disputes about whether such information has to be disclosed for use in the substantive determination of the case. As the Grand Chamber of the ECtHR put it, for example, in ***Jasper v the United Kingdom*** (2000) 30 EHRR 441 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. 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)

(2) the right to a fair hearing also obliges tribunals to give reasons for their judgments[3].

24. Both these rights may be impaired by a closed material procedure. An application for disclosure may result in one party and the tribunal knowing information that another party does not. Withholding reasons for a judgment from one party may also result in only the tribunal and the other party knowing what they actually were.

25. Each of these rights, which are entailed by the right to a fair hearing, are in the nature of principles. What they may require when applied will depend on the nature of the case and the circumstances of it. But, in repeatedly emphasising that what a fair hearing requires is "context and fact sensitive", the Home Office in its Case neglects the fact that, as Lord Bingham put it in ***R v H*** [2004] UKHL 3, [2004] 2 AC 134, at [33],

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[3] See further [33] below.

"The consistent practice of the [ECtHR], in this and other fields, has been to declare principles, and apply those principles on a case-by-case basis according to the particular facts of the case before it, but to avoid laying down rigid or inflexible rules...It is entirely contrary to the trend of Strasbourg decision-making to hold that in a certain class of case or when a certain kind of decision has to be made a prescribed procedure must always be followed. *The overriding requirement is that the guiding principles should be respected and observed*, in the infinitely diverse situations with which trial judges have to deal, in all of which the touchstone is to ascertain what justice requires in the circumstances of the particular case." (Emphasis added)

26. Any other approach would simply denude the concept of a "fair hearing" of any content. It would also render arbitrary any judgment about whether a person had been given a fair hearing, since the facts would have to be considered without any criteria or standard by reference to which they are to be assessed. That consequence is indeed manifest in the Home Office's Case where (as explained below) it is impossible to discern when a process of determination would be regarded as unfair if there was a sufficiently strong case for depriving a party of all of these rights.

iii. what limitations on the relevant rights that a fair hearing entails are compatible with it

27. The Home Office rightly recognises in its Case (at [22]) that whether a particular restriction on a relevant right that a fair hearing entails is permissible depends on two factors: (i) whether the restriction is "strictly necessary" and (ii) it must be sufficiently counterbalanced by the procedures followed by the tribunal and must not impair the "very essence of the right".

28. In relation to this second factor it is thus necessary to understand what the "very essence of the right" is, a concept which itself embodies the notion of an irreducible minimum.

29. In understanding what the "very essence of the right" may be it is necessary to have in mind the purposes which the right to a fair hearing and its constituent rights serve. It is submitted that they serve four different purposes:

(1) 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;

(2) they also avoid a party considering, not unreasonably, that the procedure is unfair, which it is a primary function of the right to a fair hearing to avoid; and

(3) the right to adversarial proceedings and the provision of reasons together help to provide the parties and the public with confidence that there has been a fair hearing and an impartial determination; 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.

30. 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. Thus, for example, as Lord Phillips pointed out in ***Home Secretary v AF*** (No 3) [2009] UKHL 28 at [63], in effect in relation to the right to adversarial proceedings, the first of the "strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him" was that "there will be many cases where it is impossible for the court to be confident that disclosure will make no difference".

31. However, As Lady 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 ECtHR 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."

As the ECtHR explained in ***Vanjak v Croatia*** *supra* 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."

32. 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].

33. 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][4],

> "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, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision...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.."

Thus, as the Grand Chamber of the ECtHR recently reaffirmed in ***Taxquet v Belgium*** (2010) Nov 16th App Nº 926/05 at [91],

> "While courts are not obliged to give a detailed answer to every argument raised..., it must be clear from the decision that the essential issues of the case have been addressed".

34. In considering any restrictions 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.

35. It is also necessary when looking at the case law to be careful not to be misled by certain cases on the right to disclosure of information which another party has which involve public interest immunity. The ECtHR has considered a number of cases in which the question has arisen whether any failure by the prosecution in its duty to disclose relevant evidence in its

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[4] See also, for example, ***Kuznetsov v Russia*** (2009) 49 EHRR 15 at [83]-[85].

possession rendered a trial unfair given the public interest in its non-disclosure. In most of these cases (it is important to note) the information in issue was not disclosed to the tribunal entrusted with taking the substantive decision (the jury) but to a judge. These were not cases, therefore, in which there was a closed material procedure in respect of the substantive decision. They are cases in which the issue should be decided by the trial judge in the absence of the jury. He was required to order disclosure of any relevant material that may weaken the prosecution's case or strengthen the defence's, even if there is a real risk of serious prejudice to an important public interest, if not to do so would render the trial unfair. Even in respect of such decisions[5], as the Grand Chamber put it in ***Jasper v the United Kingdom*** *supra* at [53], the reviewing court must

> "scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."

36. To suggest, as the Home Office does in its Case (at [19(2)]), that the court held in this case that limitations on the disclosure of relevant evidence could in principle be justified on public interest immunity grounds in order to keep secret police methods of investigation of crime without mentioning that evidence in question was not evidence available to both the prosecution and the tribunal responsible for determining the criminal charge (the jury) but denied to the defence is at best misleading. Such cases do not involve an infringement of the right to adversarial proceedings and to equality of arms in relation to the substantive determination of the criminal charge. By contrast, where the judge who had considered, but decided not to admit, evidence on public interest immunity grounds (about the content of which the defendants were not informed) which may have related to an issue of fact of determinative importance to the trial which he had himself to decide, the Grand Chamber found that the procedure did not comply with the requirements of adversarial proceedings and equality of arms and that it did not incorporate sufficient safeguards to protect the interests of the accused, since their representatives were unable to argue the case in full before the judge: see ***Edwards and Lewis v the United Kingdom*** (2005) 40 EHRR 44 (in particular [57]-[59] of the Chamber judgment approved by the Grand Chamber at [47]-[48]). There is an important

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[5] Others in this category include ***Rowe and Davies v the United Kingdom*** (2000) 30 EHRR 1, ***Fitt v the United Kingdom*** (2000) 30 EHRR 480, and ***Botmeh and Alami v the United Kingdom*** (2008) 46 EHRR 31.

difference, therefore, between cases in which applications for disclosure are determined by the same tribunal which makes the substantive determination in a case and those in which they are not.

37. It is submitted that:

(1) the very essence of the rights to a fair hearing, to adversarial proceedings and to equality of arms is negated if sufficient information about the substantive case that a party has to meet is not disclosed to enable him effectively to challenge it; and

(2) that the very essence of the rights to a fair hearing, to adversarial proceedings, to reasons for the determination and of access to an appeal court is negated if sufficient reasons are not provided which would enable any error in the determination to be detected and an effective right of appeal exercised.

38. The Grand Chamber of the ECtHR held in the context of procedures for reviewing the lawfulness of an individual's detention in ***A v the United Kingdom*** (2009) 49 EHRR 29 that sufficient information about the substantive case which a party has to meet has to be disclosed to enable him effectively to challenge it. 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*** (N° 2) at [173]-[177], rightly held that fundamental rights likewise required such disclosure before a person was deprived of the use of his property. It should be noted that, in the latter of these two cases, the General Court makes it plain that, to meet this requirement, not only may details of the allegations made have to be disclosed (as the Employment Tribunal declared in this case) but also that details of the evidence that supports them may have to be disclosed. Thus, as Lord Hope put it in ***Home Secretary v AF (No 3)*** *supra* 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."

39. The reason why sufficient information about the substantive case which a party has to meet has to be disclosed to enable him effectively to challenge it is that, without such information, that party does not receive in substance any real hearing and is placed at such a significant relative disadvantage that the scales of justice are irredeemably weighted against him.

40. The denial of such information also fatally undermines all the purposes for which the right to a fair hearing exists. It makes it more likely that the determination will be incorrect and for that reason unjust: see [30] above. But, more significantly still, it inevitably also destroys a primary function that the right to a fair hearing exists to serve: depriving a party of sufficient information about the substantive case which he has to meet to enable him effectively to challenge it will cause a party to consider, not unreasonably, that the procedure is unfair: see [31]-[32] above.

41. Further depriving a party of sufficient information about the substantive case he has to meet to enable him to challenge it and of reasons which would enable any error in the determination to be detected opens the door to arbitrariness, abuse and error (which are the antithesis of what a fair hearing is designed to secure) which cannot be detected even by a party to the proceedings, thus fatally undermining confidence in the fair and impartial administration of justice which is essential for a democratic society under the rule of law: see [33] above. In that respect it is insufficient to rely on the presumed good intentions of those who participate in a closed procedure. The Convention is designed to provide practical and effective guarantees of the rights it confers. Institutions have to be well-designed as well as well-manned.

42. Moreover an effective right of appeal cannot be exercised without sufficient knowledge about the case which a party has to meet and the provisions of reasons which would enable any error in the determination to be detected: see [33] above. That impairs the very essence of the right of access to a court of appeal since it renders the right of appeal practically impossible to exercise.

iv. the two counterbalancing factors relied on by the Home Office

43. In its Case the Home Office seeks to suggest that, whatever the extent of "non-disclosure", a fair hearing can nonetheless be achieved, at least in cases somewhere on its "spectrum", where (i) there is scrutiny of all relevant material by an independent court and (ii) the closed information can be tested by a special advocate. Of these two factors the Home Office states (at [25]) that "the ECtHR has emphasised that the primary procedural safeguard is the scrutiny which can be provided by an independent court fully appraised of all relevant material".

a. the involvement of an independent and impartial tribunal as a "counterbalancing safeguard"

44. In fact, the ECtHR has stated, when considering whether any non-disclosure has been counterbalanced by adequate procedural guarantees, that"the mere involvement of a judge does not suffice": see ***Mirilashevili v Russia*** (2008) Dec 11th App N° 6293/04 at [198].

45. Thus, in two recent cases, the licences which the applicants had to keep and carry a firearm were annulled because they had been listed in a law enforcement database containing data on the alleged risks to society posed by individuals. That information, which was decisive of the case, was withheld from the applicants on public interest grounds when they challenged the decision but was considered by the courts. Their rights under article 6(1) were found to have been violated. As the ECtHR stated in ***Uzuckauskas v Lithuania*** (2010) July 6th App No 16965/04,

> "50. ... as transpires from the decisions of the Lithuanian courts, the operational records file was the only evidence of the applicant's alleged danger to society. The Court notes that on numerous occasions the applicant asked for the information to be disclosed to him, even in part. However, the domestic authorities - the police and the courts - denied his requests. Whilst, before dismissing the applicant's case, the Lithuanian judges did examine, behind closed doors and in their chambers, the operational records file, they merely presented their conclusions to the applicant. It was not, therefore, possible for the applicant to have been apprised of the evidence against him or to have had the opportunity to respond to it, unlike the police who had effectively exercised such rights (see, mutatis mutandis, *Gulijev v. Lithuania*, no. 10425/03, § 44, 16 December 2008).
>
> 51. In conclusion, therefore, the Court finds that the decision-making procedure did not comply with the requirements of adversarial proceedings or equality of arms, and did not incorporate adequate safeguards to protect the interests of the applicant. It follows that there has been a violation of Article 6 § 1 in the present case."

That case, and the similar case of ***Pocius v Lithuania*** (2010) July 6th App No 35601/04, shows that examination of information by the court does not itself suffice to secure compliance with the right to a fair hearing, including the rights to adversarial proceedings and equality of arms.

46. In fact, the involvement of an independent and impartial tribunal is not a "counterbalancing factor". It is something that is required in any event in the determination of a person's civil rights and obligations. What a person is entitled to in accordance with article 6(1) of the ECHR, *in addition to* such a determination, is a fair hearing by such a tribunal. Thus the reason why examination of the closed material by the court is insufficient if a party does not at least know enough to enable him effectively to challenge the case against him is that the procedure does not in substance give him any effective hearing and it does not give him a fair one relative to his opponent. It also leaves open scope for arbitrariness, abuse and error.

47. The cases on which the Home Office relies in this part of its Case (at [26]-[28]) do not show that examination by a court is sufficient[6]:

(1) In ***Tinnelly & Sons Ltd v the United Kingdom*** (1997) 27 EHRR 249 a certificate given by the Secretary of State, that an act was done for the purpose of national security (and was thus lawful), was required by statute to be treated as conclusive evidence that it was done for that purpose. Accordingly the violation of article 6(1) occurred because that certificate prevented any judicial determination of the relevant dispute on the merits. The Court did not find that, had the court considered the relevant information in a closed material procedure, that would have sufficed. There was no such procedure in that case to assess for its compatibility with article 6(1). If anything, however, the Court's observation (at [78]), that a procedure allowing the tribunal to examine in complete cognisance of all relevant evidence and *the merits of submissions by both sides* might enhance public confidence, implicitly assumes that any party denied information will at least know sufficient information to enable him to challenge the case against him, otherwise that party will be unable to address meaningful submissions to the court about the relevant evidence.

(2) ***Liu & Liu v Russia*** (2008) 47 EHRR 33 was not a case in which article 6 was engaged at all. The ECtHR found that there were insufficient safeguards against arbitrary interference with private and family life on the ground of national security, as the relevant information had been denied to the court to enable it to consider whether the contention that one of the applicants constituted a

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[6] The case of ***Kennedy v the United Kingdom*** relied on in [29] of the Home Office's Case is considered in [70]-[72] below.

danger to national security had a reasonable basis in fact: see at [63]. It does not follow that, had the relevant information been disclosed to the court, that of itself would necessarily have satisfied the requirements of article 8, much less article 6. In fact the Court's statement (at [59]), that in such cases such a measure "must be subject to some form of *adversarial proceedings* before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified material", suggests that disclosure to the independent body alone of any information would not have satisfied article 8, let alone article 6(1).

(3) In ***Dagtekin and others v Turkey*** (2007) Dec 13th App Nº 70516/01 and ***Gencer v Turkey*** (2008) Nov 25th App Nº 31881/02 the applicants' leases of land were effectively annulled following the results of a security investigation that was never communicated to them or to the courts when the decisions were challenged. As the Court put it in Dagtekin,

> "34........as in the instant case, the conclusions of the security investigation were not revealed to the applicants or the domestic courts, the applicants were deprived of sufficient safeguards against arbitrary action on the part of the authorities.
>
> 35. In view of the forgoing, the Court concludes that the non-disclosure of the security investigation report infringed the applicants' rights to a fair hearing..."

This does not suggest (as the Home Office case does at [28]) that the applicants were deprived of sufficient procedural safeguards only because the report was not disclosed to the court. But, even if it had done, it would not follow that disclosure of the report to the court alone would have sufficed. It is one thing to require the involvement of an independent and impartial tribunal. It is another to find that such involvement alone suffices. If it did there would be no right to a fair hearing in the determination of civil rights and obligations by that tribunal.

b. the involvement of a special advocate as a "counterbalancing safeguard"

48. The second alleged "counterbalancing safeguard" put forward by the Home Office is the involvement of a special advocate.

49. For this purpose a special advocate is a person with legal qualifications appointed to represent an individual's interests, in proceedings from which that individual is excluded, who may not seek instructions or communicate with anyone (including the individual excluded) about any information denied to that individual without the permission of the tribunal. Although such an advocate may seek to represent that person's interests, he or she does not represent him: he or she is not that person's counsel. He or she may not be obliged to do what that person wants or would want to do if that person knew what the special advocate does.

50. The question is thus whether (and, if so, when) the appointment of a special advocate may itself mean that such an individual will receive a fair hearing in the substantive determination of his civil rights and liabilities even though the individual has been denied sufficient information enabling him effectively to challenge the case against him (with or without that advocate's assistance).

51. The courts in this country have recognised that, even with the assistance of a special advocate, an individual who is not aware of the case against him suffers from "grave disadvantages": see per Lord Woolf CJ ***R (Roberts) v Parole Board*** [2005] 2 AC 738 at [60]; per Lord Bingham and Lord Carswell ***Home Secretary v MB*** *supra* at [35] and [82]. Thus, for example, Ouseley J has stated in ***Home Secretary v Rideh*** [2008] EWHC 1993 (Admin) in the context of a control order that:

> "21......cross-examination by special advocates can usually deal with evidential reliability, possible alternative and innocent inferences, internal consistency or contradictions, the significance of pieces of evidence and the strength of the case overall. What they cannot do without instructions or evidence is to provide evidence or explanation which contradicts or explains the closed essential features of the case against him or offer alternative inferences which they are not aware of or lack any support for.

> 40.The real value [of disclosure] lies in the potential for a controlled person to provide evidence which shows a different picture or an innocent interpretation or explanation which counters the basis for the adverse inferences and does so beyond that which the special advocates may suggest. This would either be because there would now be an evidential basis for those suggestions or because the special advocate may not be able to anticipate or put together what the controlled person's position is. He may also be able to provide the special advocate with information or statements to be deployed as the special advocate sees fit, which the court and SSHD may never know of."

It has to be borne in mind that the issue in control order cases, such as those which came before the Appellate Committee in ***Home Secretary v AF (No 3)***, concerned what the individual the subject of the order himself was or had been involved in. In such cases the inability of a special advocate to obtain instructions from the individual whose interest he is to represent is obviously relevant. Less obviously relevant in such cases, but in other cases equally if not more important, may be the prohibition on the special advocate's communication with others, and the insufficient resources that the special advocate may have, in order to investigate, and to obtain evidence to refute or cast doubt on, the contentions and the evidence to be advanced by another party as part of its case in relation to which the individual in question may not be able to assist the special advocate from his own knowledge (even if he had been able to communicate with him).

52. The existence of these grave disadvantages where insufficient information is disclosed to the person excluded from any hearing enabling him effectively to meet the case against him (with or without the assistance of a special advocate) necessarily impairs one function that the right to a fair hearing serves, achieving the correct result. It inevitably makes it more likely that the determination will be incorrect and for that reason unjust.

53. But that is not necessarily the main objection to treating the involvement of a special advocate as sufficient. The involvement of a special advocate does not repair the inevitable destruction of the very essence of the right to a fair hearing that excluding a party from it in effect causes in such circumstances. Depriving a party of sufficient information about the substantive case which he has to meet to enable him effectively to challenge it means that effectively he will not be able to participate in what will be the hearing the outcome of which determines his civil rights and obligations. He will be excluded from that hearing. He will thus

be effectively denied the hearing to which he is entitled: he will effectively not be heard in the determination of his civil rights and obligations. Nor does it restore equality between the parties. The other party or parties will be heard. His exclusion from the hearing, therefore, is manifestly unfair given their participation in it. Such exclusion will inevitably cause a party to consider, not unreasonably, that the procedure is unfair (which it is a primary function of the right to a fair hearing to avoid).

54. The fact that someone with a right to participate in a hearing and to appeal presents the case for a party excluded from it does not remedy the breach of article 6 which that exclusion necessarily involves, as the decision of the ECtHR in ***Capital Bank AD v Bulgaria*** (2007) 44 EHRR 48 illustrates. In that case its regulator sought to have the Bank wound up. The regulator appointed the liquidators who represented the Bank at the hearing of the petition and the court appointed liquidators from those judged suitable by the regulator who represented the Bank in the subsequent appeal proceedings. The ECtHR found that those representing the Bank in the proceedings lacked sufficient structural guarantees of independence from the other party to the proceedings (which may be of relevance when considering the status of some special advocates): cf [97], [117]-[119]. But, for present purposes what is of significance is that the relevant legislation provided for a "prosecutor" to participate in the proceedings. Understandably there was no complaint about his lack of independence. (The Prosecutor's Office was in fact part of the judicial branch and independent of the executive and the function of the prosecutors, who enjoy the same tenure and immunities as do judges in Bulgaria, including participating in civil proceedings: see ***Zlínsat, Spol. SRO v Bulgaria*** (2006) June 15th App N° 57785/00 at [33] and [76].) In this case the "prosecutor" supported and put the case that the Bank should not be wound up and it was he who pursued appeals against the court's decision that it should be: see ***Capital Bank AD*** at [24]-[33], [61]-[63]. There was no suggestion that he had not done so competently. The fact that the interests of the Bank had been fully represented with knowledge of all the relevant facts by an independent judicial officer (the "prosecutor"), even if the Bank itself had not been represented, did not prevent there being a violation of article 6(1) on the basis that the Bank had not itself been able to participate effectively in the proceedings. As the Court put it:

> "118. The rights of access to a court and of adversarial proceedings, enshrined by Article 6, imply, among other things, the possibility for the parties to a civil or criminal

trial to be able to effectively participate in the proceedings (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 13, § 24; and *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26) and adduce evidence and arguments with a view to influencing the court's decision. The litigants' confidence in the workings of justice is based on, inter alia, the knowledge that they have had the opportunity to express their views (see *Pellegrini v. Italy*, no. 30882/96, § 45, ECHR 2001-VIII). As it was represented by persons dependent on the other party to the proceedings, the applicant bank was unable, especially when the case was being examined by the Supreme Court of Cassation, to properly state its case and protect its interests. <u>It is true that the prosecutor's office came to its aid, but that cannot remedy the fact that it was denied the opportunity to present its case before the courts</u> (see, mutatis mutandis, *Philis v. Greece (no. 1)*, judgment of 27 August 1991, Series A no. 209, pp. 20-23, §§ 58-65).....

119. There has therefore been a violation of Article 6 § 1 on that account also." (Underlining added).

55. Thus the very essence of the rights to a fair hearing, to adversarial proceedings and to equality of arms is negated if sufficient information about the substantive case which a competent party has to meet is not disclosed to enable him effectively to challenge it, even if his interests are in fact represented by an independent judicial officer.

56. Nor does the presence of a special advocate solve the further problem that the very essence of the rights to a fair hearing, to adversarial proceedings, to reasons for the determination and of access to an appeal court are negated if a party who is excluded from proceedings does not have sufficient information about the case against him and is not provided with sufficient reasons which would enable any error in the determination to be detected and an effective right of appeal exercised.

(1) Most obviously a vital safeguard against abuse by a tribunal is removed: even if a special advocate might otherwise be in a position to reveal manifest abuse, he may not do so without the permission of the very tribunal who may be guilty of that abuse.

(2) Similarly the necessary confidence that a party has had a fair hearing which he may obtain from seeing how his case has been dealt with during the

proceedings and in its determination by the tribunal is destroyed by his ignorance of the case against him, of how it has been considered during any hearing from which he has been excluded and of the reasons why it may have been successful. The presence of a special advocate cannot recreate the guarantee of a fair hearing that knowledge of the parties' cases, participation in the proceedings and knowledge of the reasons for the substantive decision is intended to provide.

(3) Equally a party who is left in effective ignorance of the case against him and of the reasons why it was successful cannot make any effective use of any right of appeal he may have. Any judgment he may receive is inscrutable. He cannot be enlightened by a special advocate. Indeed, even if a special advocate was given a right to appeal on his behalf, that would itself merely indicate that the party was being denied all right to participate effectively in the determination of his civil rights and obligations.

57. The presence of a special advocate is thus necessarily an insufficient "counterbalance" when insufficient information is disclosed to any person excluded from any proceedings to enable him effectively to meet the case against him (with or without the assistance of that special advocate). The very essence of his right to a fair hearing, and of his rights to adversarial proceedings, to equality of arms and to reasons for the substantive determination of civil rights and obligations (which are entailed by the right to a fair hearing), is necessarily impaired in such a case.

v. the Home Office's "spectrum"

58. The Home Office appears to accept that the very essence of the right to a fair hearing is impaired if insufficient information is disclosed to any person excluded from any proceedings to enable him effectively to meet the case against him, notwithstanding the involvement of a special advocate and an independent and impartial tribunal, in some cases but not in others depending on how important the outcome for that person may be on a "spectrum" ranging from cases involving criminal or deprivation or severe restriction of liberty (at one end) to claims for damages, discrimination or judicial review (at the other end): see its Case at [16]. This approach appears to be based on the proposition that what a fair hearing involves should

take account of what is at stake for the individual concerned and for the general community.

59. It may be thought that the characterisation of this “spectrum” by the Home Office by reference in some cases to the type of procedure is untenable. Judicial review and claims for damages may both relate to cases of deprivation of liberty where false imprisonment is in issue (thus contracting the postulated “spectrum” into a single point). Equally judicial review and claims for damages are both procedures whereby the most fundamental rights and liberties that an individual may have may be established and vindicated. Presumably, therefore, any “spectrum” analysis (if it is to have any validity) ought to be expressed by reference to the importance of what is at stake in any particular determination for individual and the general community. The proposition which the Home Office appears to be espousing when propounding a “spectrum” analysis, therefore, is that the less important the outcome of any particular determination may be for the individual the less he requires in order to have fair hearing.

60. Such an approach 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. None of this is remotely plausible. Nor is it clear where on any spectrum the Home Office would contend that there is a threshold at which it becomes necessary to disclose sufficient information to a party to enable him effectively to challenge the case against him and how it is to be identified in principle. (Is the loss of a person’s means of livelihood or property, or severe restrictions on their enjoyment, sufficient? Is interference with their private and family life? And, if not, why not?) Indeed, 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. Further it is also not remotely plausible to suppose that what fairness requires is to be determined solely 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.

61. The “spectrum” analysis suggested is in fact incompatible with Article 6(1) and the structured analysis of its requirements that the ECtHR has adopted.

(1) The analysis suggested itself assumes that a fair hearing is merely something of advantage to the individual concerned which is at odds with the interests of the general community. That is a false contrast. The general community has an overriding interest in a democratic society under the rule of law in the fair and impartial administration of justice without which such a society cannot subsist. That is why the right to a fair hearing is an absolute right.

(2) What a fair hearing may require in particular cases may vary to some extent depending on the nature of the issues to be determined and what is at stake. Thus article 6(3) guarantees certain minimum rights in the determination of criminal charges that are not necessarily guaranteed in the determination of civil rights and obligations, given *inter alia* the more varied intrinsic nature of the issues and procedures which may be best adapted to resolving them in such cases. But, as explained above, the ECtHR has recognised that both in criminal and civil cases a fair hearing presupposes at least a right to adversarial proceedings and to equality of arms.

(3) In some cases, of course, there may be a tension between giving full effect to these rights and other legitimate interests. But in resolving that tension no "spectrum" analysis falls to be applied. It is not simply a case (as the Home Office suggests in its Case at [69]) "that the individual's rights are to be balanced against the community's interests". The structured approach adopted by the ECtHR is not merely that any limitation on giving full effect to such rights must be strictly necessary, but also that it must be sufficiently counterbalanced and must not impair the very essence of the rights concerned (as the Home Office itself accepts).

62. The suggested "spectrum" analysis, therefore, not only rests on implausible assumptions and would be unworkable in practice. But it is also unprincipled. It leads simply to the possibility of labelling a process as fair in which a party, who is entitled to a fair hearing in the determination of his civil rights and obligations, never enjoys a hearing or one conducted fairly if there is thought to be a sufficient public interest in denying him it, without recognising the vital public interest in providing such hearings in a democratic society under the rule of law.

63. But in any event the "spectrum" approach does not assist the Home Office in this case. It

cannot explain why the possible wrongful loss of a firearms licence (in ***Uzuckauskas v Lithuania*** and in ***Pocius v Lithuania*** *supra)* is a more serious outcome warranting more by way of a fair hearing than the possible wrongful blight on an individual's employment prospects, and the possible wrongful affront to his human dignity, resulting from racial discrimination (in this case).

vi. non-justiciable matters and cases

64. What civil rights and obligations a person may have are matters for individual States to determine. In addition an individual State may prescribe rules preventing or limiting the possibilities of bringing potential claims and prescribing what evidence is inadmissible in them. Thus, for example, the ECtHR has recognised that there may be justifiable immunities in respect of certain persons (as in certain cases of sovereign immunity in relation to claims relating to discrimination[7] and to personal injury[8]) and in relation to the admission of certain evidence (as in the case of parliamentary immunity in relation to defamation[9]). In such cases the ECtHR is recognising in effect that there can be certain matters that, most exceptionally, must be treated as non-justiciable in the public interest.

65. The same is true in certain cases of public interest immunity. In the United Kingdom in a civil case a court or tribunal must decide whether the public interest in disclosure of information which is relevant to the determination of an issue in the case is outweighed by the public interest in the information being withheld. The more important the information is to the just determination of a claim the greater the public interest in withholding it must be if it is to be withheld. Accordingly the occasions on which information may be withheld in civil cases in which the outcome would be different given its admission should be exceedingly few if the court or tribunal gives appropriate weight to the achievement of justice. Nonetheless it must also be a possibility that the public interest in withholding the information may be such as to justify withholding it notwithstanding the fact that a different outcome would be reached if it was taken into account. In such a case, as in the case of parliamentary immunity, the evidence to which public interest immunity attaches is effectively recognised as non-justiciable.

7 See ***Fogarty v United Kingdom*** (2002) 34 EHRR 12.

8 See ***Al-Adsani United Kingdom*** (2002) 34 EHRR 11.

9 See eg ***Zollmann v the United Kingdom*** (2003) Nov 27th App N° 62902/00.

66. A closed material procedure is one possible approach, but not necessarily the best approach, which could be adopted when dealing with matters that it is not in the public interest to make justiciable in the determination of civil rights and obligations. There are two other possible reactions when evidence is inadmissible or it is privileged and also where there may be relevant evidence from persons (such as those enjoying diplomatic immunity) who are unwilling to give evidence and are not compellable. Cases may be determined absent such evidence or cases may be stayed if no fair determination of it is possible.

67. The former approach means that there can be a fair hearing of the substantive claim based on the admissible evidence available which respects the parties' rights to adversarial proceedings and equality of arms. It also maintains open justice. Generally, it is submitted, this approach is to be preferred to any closed material procedure (as explained in Justice and Liberty's Case in *Deghayes*).

68. But the latter approach is also possible, as in the case of a "fair trial stay" (described in [101] of Justice and Liberty's Case in *Deghayes*). Similarly in ***Carnduff v Rock*** [2001] EWCA Civ 680, [2001] 1 WLR 1786, the Court of Appeal (Waller LJ dissenting) struck out a claim in contract by a police informer to recover remuneration for the delivery of information to the police to which he claimed to be entitled as no fair trial could be held given public interest immunity attaching to the information necessary to determine it. The majority reached their conclusion that there was no "sensible possibility" of a fair trial being held only by reference to the issues as defined in the pleadings, what they would inevitably involve and what the court's judgment on any application to withhold information on the basis of public interest immunity would inevitably be: see eg per Laws LJ at [36] and [40] with whom Jonathan Parker LJ agreed at [54]. The decision itself therefore fully recognised the claimant's rights to adversarial proceedings and equality of arms. The ECtHR found that approach to be compatible with article 6: see ***Carnduff v United Kingdom*** (2004) Feb 10 App Nº 18905/02. Effectively what it again recognised was that in the circumstances the claim was non-justiciable given information which was inadmissible.

69. These possible alternatives to a closed material procedure need to be considered when addressing the question whether its adoption is "strictly necessary" in this case: see below.

70. However another example of a matter which is non-justiciable under article 6 is the

existence of secret surveillance whilst its secrecy needs to be preserved (if article 6 is applicable at all in such a case, which the ECtHR held that it was not in ***the Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria*** (2007) June 28th App N° 62540/00 at [104]-[107]). The ECtHR has accepted that, under certain strict conditions and providing that adequate and effective guarantees exist against its abuse, a system of secret surveillance may be justifiable in a democratic society notwithstanding the inevitable interference it occasions with rights conferred by article 8 of the ECHR. But, assuming in ***Klass v Germany*** (1979-80) 2 EHRR 214 that article 6 applied in relation to legislation which permitted the State authorities to open and inspect mail and listen to telephone conversations in order to protect against, *inter alia*, "imminent dangers" threatening the "free democratic constitutional order" and "the existence or the security" of the State, however, the ECtHR stated at [75]

> "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."

71.That is also in essence why the ECtHR found in ***Kennedy v United Kingdom*** (2010) May 18th App N° 26839/05, again on the assumption that article 6 applied, that the procedures adopted by the Investigatory Powers Tribunal to determine a complaint that the applicant's communications were being secretly intercepted in "challengeable circumstances" were not incompatible with article 6. More would have meant that the secrecy of whether any interception of communications had in fact occurred, the very subject matter of the dispute, the need to maintain which the court regarded as a justifiable aim, would not be preserved: see [182]-[191]. Accordingly, as long as the existence of the very subject matter of a dispute must justifiably remain secret, it is effectively non-justiciable and the substantive protections that Article 6 contains cannot be applied in substance to its resolution[10].

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[10] Some of the reasoning in this case is inconsistent with other case law. For example the approach to reasons in [189], effectively that no reasons need be provided at all, is inconsistent with many other cases on the need for reasons and what they must deal with such as the subsequent Grand Chamber decision in ***Taxquet v Belgium*** supra and ***Hadjianastassiou v Greece*** (1992) 16 EHRR 219 at [33]: "The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the

72. The Home Office may no doubt seek to suggest that this case should be explained instead on the basis that less was at stake for the individual in ***Kennedy*** than it was in ***A and others v the United Kingdom*** and that accordingly what article 6 required was less. In its reasoning in ***Kennedy***, however, the ECtHR did not rely on, nor did it refer to, what was at stake in the outcome of the case to justify its approach nor did it even refer to the Grand Chamber decision in *A*. Indeed its decision in ***Kennedy*** cannot be reconciled with others such as ***Uzuckauskas v Lithuania*** and ***Pocius v Lithuania*** except on the basis that, as long as the existence of the very subject matter of a dispute must justifiably remain secret, it is non-justiciable. The possible wrongful loss of a firearms licence (which was at stake in those cases) cannot sensibly be regarded as more serious than the possible destruction of an individual's privacy by intrusive surveillance by the State.

73. There are thus very exceptional cases which may in effect for various reasons become effectively non-justiciable.

74. Although what civil rights and obligations persons may have and their content are matters for States, immunities from those which States create in respect of persons or information are matters which the ECtHR has chosen to treat as procedural bars, and thus subject to its jurisdiction, precisely because of the scope for abuse which the possibility of their uncontrolled creation would afford. Any recognition that a case may be effectively non-justiciable should only be reached in the most limited of circumstances if it is not to undermine article 6, for it is effectively one in which the court is recognising that there is no civil right capable of adjudication between the parties in the circumstances - a conclusion a court or other tribunal should be most reluctant to reach for precisely the same reason.

vii. other matters relied on by the Home Office

75. The Home Office contends that "since *Chahal*, the ECtHR has put its imprimatur on the closed material procedure"; "that "a closed material procedure is in principle compatible with article 6"; and that "article 6 has already been held to permit closed material procedures in a wide variety of contexts, including in the criminal context" (see its Case at [45(1)] and [46]).

(1) As explained above, these general assertions are unilluminating since they fail

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rights of appeal available to him.".

to address the circumstances in which the non-disclosure of information to a party which is available to the tribunal and another party is compatible with article 6(1) of the ECHR. For example it does not assist in addressing the issues in this case for it to be shown that in criminal cases a closed material procedure may be adopted in a determination by a tribunal which does not determine the substantive charge against an individual of a claim that the public interest justifies withholding information from him on which the party having it does not propose to rely. Nor does it assist in addressing the issues in this case to show that maintaining the anonymity of a witness involves closed material and may be justifiable where that witness's evidence is not the sole or decisive basis for the determination in the case. Nor does it assist to assert that a party can be denied information in the substantive determination of a dispute on its merits which another party and the tribunal have, without considering what the information is which a party may be denied or its significance in the context of the issues and other information available in the case.

(2) The assertion that "since *Chahal*, the ECtHR has put its imprimatur on the closed material procedure" is again misleading. As the Grand Chamber pointed out in ***A v the United Kingdom*** *supra* at [210]-[211], not only had the individual in the procedure in Canada alluded to in *Chahal* been provided with a summary of the evidence produced in the closed hearing, but also the courts had referred to that procedure including a special advocate, in ***Chahal***, ***Tinelly & Sons v United Kingdom*** and ***Al-Nashif v Bulgaria***, "without expressing any opinion as to whether such a procedure would be in conformity with the Convention rights at issue".

(3) The cases in which it is alleged by the Home Office (in its Case at [47]) that "away from the context of deprivations or restrictions on liberty, the ECtHR and domestic have sanctioned closed material procedures", apparently in support of its assertion that article 6 has already been held to permit closed material procedures in a wide variety of contexts", are (i) ***Leander v United Kingdom*** (1987) 9 EHRR 433, in which article 6 was not engaged; (ii) ***Kennedy v United Kingdom*** *supra,* in which on the assumption that article 6 was engaged, the court held in effect that as long as the existence of the very subject matter of a dispute must justifiably remain secret, it was non-justiciable; (iii) ***RB (Algeria) v the***

> ***Home Secretary*** [2009] UKHL 10, [2010] 2 AC 110, in which article 6 was again not engaged, and nor was article 5(4), in relation to the conduct of the domestic deportation proceedings; (iv) ***R (Roberts) v the Parole Board*** [2005] UKHL 45, [2005] 2 AC 738 in which again article 6 was not engaged and the Appellate Committee held it was premature to determine whether giving effect to the procedure in that case was compatible with article 5; and, finally, (v) ***Tinnelly & Sons v United Kingdom*** *supra* in which the compatibility of a closed material procedure under article 6 never arose (as there was no such procedure in that case). Further observations on ***Roberts*** and on another case on which the Home Office elsewhere in its Case places reliance, ***AHK and Others v the Home Secretary*** [2009] EWCA Civ 287, [2009] 1 WLR 2049, may be found in Justice and Liberty's Case in *Deghayes* at [122]-[145]. But the extent of the illumination (if any) that such cases may provide on the requirements of a fair hearing under article 6 must necessarily also be considered in the light of the cases and recognised principles already referred to above and to which the Home Office in its Case does not refer.

76. The Home Office also seeks to invoke in its Case (at [146]- [149]) the "*Ullah principle*" that domestic courts should keep pace with the ECtHR but not go beyond it. The object of invoking this principle appears to be to encourage the Supreme Court to adopt the most restrictive approach possible to the requirements of article 6 consistent with the case law on it. But, as the ECtHR 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". Furthermore the principles applicable, fairly considered, ought not to be in reasonable doubt. Nor can it be justifiable for this country to adopt such a reluctant and grudging approach to giving effect to such an important right.

vii. conclusion

77. In any case which is justiciable in the circumstances, a procedure which limits the rights to adversarial proceedings, to equality of arms and to the provision of reasons for the decision will be compatible with a party's right to a fair hearing in the determination of his civil rights and obligations only if:

(1) each limitation is strictly necessary to achieve a legitimate objective;

(2) sufficient information about the substantive case a party has to meet is disclosed to enable him effectively to challenge it; and

(3) sufficient reasons for the determination are provided to enable it to be seen that the tribunal has fairly heard the dispute and to enable any material error in the determination to be detected and any right of appeal to be effectively exercised.

(c) other rights in article 6(1) which may be engaged in this case

78. In addition to a fair hearing a person is also entitled in the determination of his civil rights and obligations to a public hearing by an independent and impartial tribunal and to judgment being pronounced publicly.

79. As in the case of a fair hearing, a public hearing need not involve an oral hearing nor need a judgment be pronounced publicly if the public has access to the arguments and judgment. Nor, if there is an oral hearing, need the party personally be present in all cases: in some cases it suffices that his representative is.

80. However the nature of the issues to be decided may mean that an oral, public hearing may be required if a party's case is to be presented effectively: see eg ***Karasev v Russia*** (2010) Nov 25th App No 30251/03 at [59]-[61], [64]. Such a hearing may be required when, for example, the nature of the issues involve disputed facts which turn on a party's credibility or his personal experience, character and relationships: eg *ibid* at [60], [66]-[67]. This appears to be the case in these proceedings: see below at [86]. A closed material procedure in such a case infringes a party's right to such an oral hearing which he may attend in two respects (even disregarding the exclusion of the public):

(1) his ability to give evidence directly related to the actual issues in the case will be impaired if he is given no opportunity to give evidence himself directly addressing significant points in another party's case on which he may be able to give specific evidence but of which he is unaware; and

(2) whilst article 6 specifically provides, where a trial is in fact held (as will be the case in these proceedings) that "the press and the public may be excluded from all or part of the trial in the interests of....national security", it specifically does

not provide for the exclusion of a party from any part of the trial. That is not to say that a party cannot be excluded if, for example, his own conduct renders that strictly necessary, conduct which aims at the very destruction of other's rights to a fair and public hearing. But it is not consistent with the terms of article 6(1) for a party to be excluded from the trial of his own case (where one is held) in the interests of national security.

81. The requirement that judgment be pronounced publicly is not one from which article 6(1) permits exceptions. This right provides a vital guarantee of the independent, impartial and proper administration of justice by exposing it to scrutiny. Thus it does not follow that, because the press and the public may be excluded from the trial, they may also be excluded from knowledge of the judgment: see ***Campbell and Fell v United Kingdom*** (1984) 7 EHRR 165 at [90]-[92].

82. No doubt a tribunal may also frame its judgment to minimise any unnecessary harm to persons and legitimate interests. But only in extreme circumstances (as Lord Judge CJ put it in ***R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*** [2010] EWCA Civ 158, [2010] 3 WLR 554, at [41] and with whom Lord Neuberger agreed at [181]) should anything less than the tribunal's full reasons be provided. It may be the case that the circulation of the judgment may be restricted in such exceptional circumstances. But the very essence of this right would be negated if the parties themselves did not receive a judgment from which it can be understood the reasons why the tribunal has determined the case in the manner it did.

THE COMPATIBILITY OF THE CLOSED MATERIAL PROCEDURE WHICH HAS BEEN ORDERED AND WHICH FALLS TO BE APPLIED UNDER RULE 54 OF THE ET RULES IN THIS CASE

(a) the procedure to be followed in this case

83. The basic rule applicable to national security proceedings relating to information is rule 54(4) of the ET Rules. It provides that

> **"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".

The orders of the Tribunal in this case refer to "closed material" without defining what it means. It is assumed, however, it is a reference to any information the disclosure of which would be contrary to the interests of national security.

84. The Tribunal has ordered (i) that the whole of the proceedings in this matter should be held in private; (ii) that Mr Tariq and his representative should be excluded from any part of the proceedings before the Tribunal when "closed" evidence and/or documents are being considered by the Tribunal; and (iii) that the Tribunal will consider both "open" and "closed documents" and the Home Office should make available to a Special Advocate, if appointed, the appropriate "closed" material: see Appendix 16 at [6].

85. The result of the second of these Orders (made under rule 54(2) of the ET Rules) was that the proceedings became "national security proceedings", for the purpose of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 ("the Regulations"), to which the Employment Tribunals (National Security) Rules of Procedure ("the NS Rules") apply: see regulation 2(1) of the Regulations and rule 1(1) of the NS Rules. The NS Rules modify the ET Rules in relation to national security proceedings: see rule 1(2). This has a number of consequences.

86. First the Home Office's response and grounds of response to the claim, which would normally have to be sent to the Employment Tribunal Office for the Secretary to send them to all other parties, is to be sent to the Secretary and he must not send to any person (such as the Claimant) who is excluded from all or part of the proceedings by virtue of an order given under rule 54: rules 4 and 5 of the ET Rules as modified by rules 3 and 4 of the NS Rules. The ban on the Secretary sending a copy of the response or grounds to such a person is unqualified and the rules make no provision for "open" or "closed" grounds of response: see rule 4(1) of the NS Rules. In fact, however, it appears that a response and some grounds of resistance have been sent to Mr Tariq: see Appendix Tabs 13 and 15. It appears from these that the Home Office's case was that "there were concerns that [Mr Tariq] could be vulnerable to an approach to determine if terrorist suspects had been flagged to the authorities or to smuggle prohibited items airside" and that the decision to withdraw his security clearance "was based on [Mr

Tariq's] close association with individuals suspected of involvement in plans to mount terrorist attacks...and that association with such individuals might make [Mr Tariq] vulnerable to attempts to exert undue influence on [him] to abuse his position": see Appendix Tab 15 at [5] and [7]. The agreed statement states (at [13]) that the Employment Tribunal considered that the full reasons for the withdrawal of Mr Tariq's security clearance could not be disclosed to him or his representatives because to do so would prejudice national security. It is not clear whether "closed" grounds were also served. The Employment Appeal Tribunal concluded (at [32]), however, that "the reasons for withholding the claimant's security clearance were contained for the most part in materials which the Home Office was not prepared to disclose". It declared, therefore, that Mr Tariq was entitled to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively: Appendix Tab 4.

87. A special advocate, Ms Judith Farbey, has been appointed under rule 8(1) of the NS Rules "to represent the interests of the claimant in respect of those parts of the proceedings from which" Mr Tariq and his representative are excluded. Except with the permission of the Tribunal she is precluded from communicating directly or indirectly with any person (including any excluded person) about any matter discussed or referred to any proceedings which are held in private unless that person was present. She is also likewise without the Tribunal's permission precluded from seeking instructions from, or otherwise communicating with, Mr Tariq or his representative on such matters and any matter contained in the grounds for Home Office's response to the claim: see rules 8(4)-(7) of the NS Rules.

88. Rule 8(3) of the NS Rules provide that, where the excluded person is the Claimant, he is to be permitted to make a statement before the commencement of the proceedings or the part of it from which he is excluded. He is also entitled to give evidence, to call witnesses, to question any witnesses and to address the tribunal at the hearing but that right is subject to his exclusion from the proceedings and to any other order under rule 54(4): see rule 9(3) of the NS Rules.

89. In relation to the reasons for the Tribunal's judgment:

(1) the Secretary must send a copy of the full written reasons to the Minister and the Minister may direct (a) that edited reasons must be produced, omitting such information as he may direct, which are to be sent to the special advocate and

(if the Minister so provides) to the claimant; or (b) that no further document shall be produced and that the full written reasons shall not be disclosed to anyone whom he specifies: see rule 10 of the NS Rules;

(2) the Tribunal may also take steps to keep secret all or part of the reasons for its judgment: see rule 54(2)(c) of the ET Rules. In exercising that power, it must discharge its duty under rule 54(4) to ensure that it does not disclose anything contrary to the interests of national security.

90. An unsuccessful claimant may appeal to the Employment Appeal Tribunal against the decision of the Tribunal on a point of law. In that Tribunal similar rules in relation to national security proceedings to those in the Employment Tribunal apply. Only once the appeal has been made may the appointment of a special advocate for those appeal proceedings be sought[11].

91. Absent the declaration of the Employment Appeal Tribunal in this case, the effect of the ET and NS Rules is thus that to the extent that it would involve disclosure of information contrary to the interests of national security:

(1) Mr Tariq has no right to know the actual case against him set out in the Home Office's grounds;

(2) he has no right to know, and to have an opportunity to challenge, any evidence on which the Home Office may rely in the determination of the case on the merits;

(3) he has no right to attend and participate in the trial of his case;

(4) he has no right to obtain any order requiring the production of material that may support his case or harm the Home Office's case which it may have;

(5) he has no right to receive a statement of the court's reasons for its decision in his case and he is dependent on a decision by the Minister what part (if any at all) of those reasons he should receive in any event.

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11 See in particular section 21 of the Employment Tribunals Act 1996 and rules 3(2), 30A and 31A of the Employment Appeal Tribunal Rules 1993.

(b) the compatibility of the procedure to be followed with article 6(1)

i. the basic rule in rule 54(4) of the ET Rules

92. Rule 54(4) of the ET Rules imposes an absolute obligation on the Tribunal to ensure that information is not disclosed contrary to the interests of national security. This involves no assessment of any balance between any harm which such disclosure may in fact cause to national security and the interests of a party such as Mr Tariq. Even 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] to [209] esp [205]. The absolute nature of Rule 54(4) is untenable.

ii. whether the restrictions on the rights to adversarial proceedings, equality of arms and the principle of open justice are strictly necessary

93. The first question that needs to be addressed is why the approach normally mandated by the law on public interest immunity should not be applied in the resolution of the dispute. The relevant law is summarised in [13]-[17] of Justice and Liberty's Case in *Deghayes*.

94. In this respect what is notable about the statutory scheme is that in respect of all matters other than national security where there may be relevant information which it would be contrary to the public interest to disclose, that information falls to be dealt with in accordance with the law relating to public interest immunity; the substantive hearing must take place in public (unless it may be heard in private in three specified cases); subject only to ordinary case management powers vested in the tribunal, a party is entitled at such a substantive hearing to give evidence, call witnesses, to question witnesses and to address the tribunal; the tribunal's written judgment and its reasons for it must be sent to all parties; and unless the hearing was in private and the tribunal so orders, any judgment and written reasons has to be entered in the Register which is open to inspection by any person without charge at all reasonable hours: see rules 14(3),16, 26(3), 29, 30, and 32 of the ET Rules and regulation 17 of the 2004 Regulations.

In other words, when dealing with all other claims in which it may be said that disclosure of information would be contrary to the public interest, the only closed material procedure which the Tribunal may adopt is one dealing with procedural applications claiming public interest immunity. In all other cases in which there may be a public interest in withholding information, therefore, the statutory scheme complies with the principles of adversarial argument, equality of arms and of open justice giving full effect to an individual's right to a fair and public hearing and to the pronouncement of any judgment publicly and enabling the right of appeal to be exercised effectively in practice if required.

95. The Home Office has failed to explain why it is strictly necessary to depart from this regime in the case of only one type of public interest in the non-disclosure of information. The disadvantages to which it is said to be put in national security proceedings (as outlined in its Case) if the information was excluded, namely (i) the difficulties of defence absent reliance on information which it may be in the public interest to withhold and (ii) financial and reputational consequences of an adverse finding[12] which might have been averted if such information was considered, are no different from those in any other civil case in which information is excluded in the public interest. The Home Office has thus failed to explain why only in the case of information which it would be contrary to national security to disclose is a closed material procedure strictly necessary when it is not necessary in others.

96. Secondly the fundamental reason why the Home Office claims that the normal procedure, including claims for public interest immunity, should be departed from appears to be that information which it would wish to rely on in its defence would be excluded if public interest immunity was applied or, if it was not withheld (because the public interest in the administration of justice outweighed any harm to the public interest in its disclosure), there would still be harm to the public interest.

(1) in relation to the first point, as Lord Wilberforce observed in ***Air Canada v the Secretary of State for Trade*** [1983] AC 394 at p438g,

> "It often happens, from the imperfection of evidence, or the withholding

[12] In fact the reputational consequences in the case of security vetting of an adverse finding in such a case against the Home Office may well be mitigated, if a claimant also appeals on the merits about the withdrawal of his security vetting to the Security Vetting Appeals Panel, by the release of its open report on such an appeal.

> of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done."

(2) in relation to the second point, whilst it is no doubt true that some harm will be done to the public interest, *ex hypothesi* greater harm to the public interest will be averted by its disclosure.

97. But in any event the Home Office has at least to explain how the approach it espouses proportionately achieves a legitimate aim (which is a less stringent test than that of strict necessity). Its complaint in the substance is that it will suffer a disadvantage in defending its claim absent the material which would otherwise be excluded on grounds of public interest. It does not contend that the law relating to public interest immunity is incompatible with the requirements of article 6. Indeed ***Carnduff v United Kingdom*** *supra* shows that the ECtHR considers that it is, even if the result of its application is that a claim is effectively non-justiciable fairly. That law would equally apply to the claimant in this case where, absent disclosure, he may well be unable to discharge the onus on him as the claimant. Both sides are thus equally at a disadvantage given the application of it. Indeed Mr Tariq may be at a greater disadvantage. The approach that the Home Office espouses, however, involves (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, Mr Tariq, is denied the right to adversarial proceedings and open justice, in presenting his case he is put at a substantial disadvantage *vis-á-vis* the Home Office, only the Home Office is likely to receive the Tribunal's full reasons for its decision, and he alone (unlike the Home Office) may have no effective right of access to the Employment Appeal Tribunal against a decision adverse to him. The Home Office has failed wholly to explain how this promotes the legitimate aim relied on, namely fairness, proportionately. It simply creates a manifestly unfair situation as between the parties which would not otherwise exist.

iii. whether the restrictions imposed impair the very essence of the right to a fair and pubic hearing, and are consistent with the right to the pronouncement of the judgment publicly and the right of access to the Employment Appeal Tribunal, if insufficient information is provided to Mr Tariq to enable him effectively to challenge the case against him

98. Assuming the case to be justiciable, for the reasons given above, if insufficient information is provided to Mr Tariq to enable him to challenge the case against him, then that impairs the very essence of his right to a fair hearing.

99. Similarly, in such circumstances, Mr Tariq will be effectively excluded from the trial of his case and his right to an oral hearing which he may attend will be substantially impaired if (as appears likely from the "open" grounds of resistance referred to in [86] above) the case involve his credibility, personal character and experience and relations with others. His ability to give evidence directly related to the issues will be impaired if he is given no opportunity to give evidence himself directly addressing significant points in another party's case on which he is able to give evidence but of which he is unaware. Moreover the safeguards against arbitariness and abuse which his right to a public hearing are intended to secure will be negated.

100. The provisions in the NS Rules enabling the Minister to dictate what if any reasons are to be provided to Mr Tariq are inconsistent with the Employment Tribunal being an independent tribunal established by law. What reasons should be provided to the parties and others by an independent and impartial tribunal is a matter for such a tribunal, not the executive, to determine. As the Master of the Rolls, Lord Neuberger stated in ***R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*** *supra* at [133]:

> "The question whether a passage in a judgment should not be made available to the public on the sole ground that it would be contrary to the public interest is a fortiori a matter for the court. What is included in, or excluded from, a judgment is self-evidently a matter for a judge, not a minister. It is another aspect of the separation of powers that the executive cannot determine whether certain material is included in, or excluded from, the open material in a judgment. That must be a decision for the judge giving the judgment in issue, subject of course to the supervisory jurisdiction of any competent appellate court."

(Indeed it is also equally incompatible with the Tribunal being such an independent body that the Minister may direct it to do under rule 54(1) of the ET Rules what the Tribunal itself ordered in this case on the Home Office's application.)

101. But, even if the Minister's powers of control were to be disregarded, without the disclosure of sufficient information about the Home Office's case and the provision to him of sufficient reasons for the determination to enable it to be seen whether the tribunal has fairly heard the dispute and to enable any material error in the determination to be detected, Mr Tariq would be denied an essential element of his right to a fair and public hearing and any right of appeal he may have in relation to an adverse decision could not be effectively exercised.

102. It is submitted, therefore, that, without the disclosure to him of sufficient information to enable him effectively to challenge the case against him and of sufficient reasons for the decision, the procedure to be followed in this case would not be compatible with Mr Tariq's rights to a fair and public hearing, with his right to have judgment delivered publicly in his case and with his right of access to the Employment Appeal Tribunal.

103. It may be the case that, as it implies in its Case, the Home Office would prefer to concede this claim rather than disclose sufficient information to enable Mr Tariq effectively to challenge any case it would prefer to advance against him in the "closed material" procedure ordered. But doing justice fairly as between parties may mean that a party feels compelled to make such concessions. The administration of justice is not without its costs. These may include, for example, discontinuing prosecutions and letting the guilty go free when to convict them would require information to be disclosed which if disclosed would harm the public interest. Although such immediate costs are never palatable, they are incurred in achieving a more valuable general interest, the fair, open and impartial administration of justice that a democratic society under the rule of law requires. In that respect the right that individuals have to have their civil rights and obligations determined only after a fair and public hearing is of particular importance when the State is a party to the proceedings. Procedures for determining disputes in secret which confer substantial advantages in such cases on the State, effectively deny an individual a hearing and yield judgments that are inscrutable by a party and the public are not compatible with the fair, open and impartial administration of justice that a democratic society under the rule of law requires.

CONCLUSION

104. It is submitted that this Court should dismiss the Home Office's appeal for the following among other

REASONS

(1) In any case which is justiciable in the circumstances, a procedure which limits the rights to adversarial proceedings, to equality of arms and to the provision of reasons for the decision will be compatible with a party's right to a fair hearing in the determination of his civil rights and obligations only if:

   (i) each limitation is strictly necessary to achieve a legitimate objective;

   (ii) sufficient information about the substantive case that party has to meet is disclosed to enable him effectively to challenge it; and

   (iii) sufficient reasons for the determination are provided to enable it to be seen that the tribunal has fairly heard the dispute and to enable any material error in the determination to be detected and any right of appeal to be effectively exercised.

(2) the Home Office has not shown that the restrictions on Mr Tariq's rights to adversarial proceedings, to equality of arms and to open justice necessarily involved in the closed material procedure in this case are strictly necessary; but in any event, assuming the case to be justiciable,

(3) without the disclosure to him of sufficient information to enable him effectively to challenge the case against him and of sufficient reasons for the decision, the procedure to be followed in this case would not be compatible with Mr Tariq's rights to a fair and public hearing, with his right to have judgment delivered publicly in his case and with his right of access to the Employment Appeal Tribunal.

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