IN THE COURT OF APPEAL — CA ref: T3/2009/2581, 2584, 2680, 2681, 2682
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT — [2009] EWHC 2959 (QB)

BETWEEN:

BISHER AL RAWI (1)
JAMIL EL BANNA (2)
RICHARD BELMAR (3)
OMAR DEGHAYES (4)
MOAZZEM BEGG (5)
BINYAM MOHAMMED (6)
MARTIN MUBANGA (7)

Appellants / Claimants

and

THE SECURITY SERVICE (1)
THE SECRET INTELLIGENCE SERVICE (2)
THE ATTORNEY GENERAL (3)
THE FOREIGN AND COMMONWEALTH OFFICE (4)
THE HOME OFFICE (5)

Respondents / Defendants

and

JUSTICE (1)
LIBERTY (2)

Interveners

SUBMISSIONS ON BEHALF OF JUSTICE AND LIBERTY

INTRODUCTION

1. These written submissions are filed pursuant to the permission granted by Maurice Kay LJ. Justice and Liberty sought permission to intervene as the judgment of Silber J on the preliminary issue in this case has serious, and potentially far-reaching, adverse consequences for the administration of justice in the United Kingdom.

2. In his judgment Silber J found that "the special advocate and the closed material procedures have been adopted to solve many problems since *Rehman*. It is now a firmly established

principle of our legal system"[1] and that there is no "limitation on their use other than that [they] will be used in exceptional cases as a last resort in order to ensure fairness"[2].

3. Silber J appears to have treated the issue[3] at times as if it merely concerned the capacity of a court to appoint a special advocate. However that is not the relevant question. The important prior question is whether the court has power to adopt a procedure in which it considers "closed material" when determining a civil claim in the absence of any enactment enabling it to do so. There is no obligation to appoint a special advocate even when a hearing excluding a party is permissible (for example when determining a claim for public interest immunity). Indeed it has been said that the power to appoint such an advocate in such a case "should be exercised only in exceptional circumstances and as a last resort": per Dyson LJ ***Shiv Malik v Manchester Crown Court*** [2008] EWHC 1362 (Admin), [2008] 4 All ER 403, at [99]. As Lord Woolf stated in ***R (Roberts) v Parole Board*** [2005] UKHL 45, [2005] 2 AC 738 (at [59] and [67]), the involvement of a special advocate

> "[must] not be used to justify a reduction in the protection available to the person affected by the non disclosure....the appointment of [such an advocate] should not be used as a justification for reducing the rights that [an individual] may otherwise have but only as a way of mitigating the disadvantage he would otherwise suffer if his rights were to be reduced with or without [such an advocate]."

4. The prior, and more significant, issue in this case is whether the court has power to adopt

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1 See at [88].

2 See at [54].

3 The issue is: "Could it be lawful and proper for a court to order that a "closed material procedure" be adopted in a civil claim for damages?..A "closed material procedure" means a procedure in which: (a) a party is permitted to (i) comply with his obligations for disclosure of documents, and (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as "closed material"), and (b) disclosure of such closed material is made to Special Advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For [this purpose], disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest".

a procedure which excludes a party from knowing or dealing with "closed material" when determining a civil claim in the absence of any specific enactment authorising it to do so.

5. It is important to emphasise that such a "closed material" procedure means that, in order to avoid (and to the extent that it is necessary to avoid) any disclosure of any material which is "likely to harm the public interest" in any respect,:

(1) a party is denied knowledge of another party's statement of case,

(2) a party is denied knowledge of material that may support his case or harm another party's case,

(3) a party is denied knowledge of, and an opportunity to challenge, the evidence on which another party may rely,

(4) a party is denied the right to attend the trial of his own case,

(5) a party is denied the opportunity to make submissions on another party's case;

(6) a party is denied the right to receive a statement of the court's reasons for its decision in his case, and

(7) a party is denied an effective right to appeal the decision of the court (if adverse to him) based on that court's reasons.

6. These are well established rights of a party to a civil claim. When Parliament has decided that the courts should be able to restrict these fundamental rights in such circumstances, it has legislated to impose such restrictions. There is no statutory power enabling a court to impose them generally in civil claims or in this case.

7. It is Justice and Liberty's case that:

(1) the court has no power to do so in the absence of a specific statutory power authorising it to do so;

(2) the Civil Procedure Rules cannot and do not confer such a power in the case of a civil claim for damages and the inherent power of the court does not enable the court to adopt such a procedure;

(3) there is no authority which requires this court to hold otherwise;

(4) insofar as the ordinary manner of dealing with claims for public interest immunity may lead to any practical problem in providing a party with a fair hearing (which is doubtful), the law has recognised other means of dealing with

such issues when appropriate to do so: the introduction of a "closed material" procedure would require legislation; but

(5) even if the court had power to provide for a "closed material" procedure, it would be self defeating and pointless if the court complies with its duty to apply the law on public interest immunity.

8. JUSTICE, founded in 1957, is a UK-based human rights and law reform organisation. It is also the British section of the International Commission of Jurists. Liberty (the National Council for Civil Liberties) was formed in 1934 and is an independent, non-political body whose principal objectives are the protection of civil liberties and the promotion of human rights in the UK. Both organisations have a particular interest in issues arising from "closed proceedings" and the use of "closed material". They have consistently questioned the need for, and fairness of, "closed proceedings" even where adopted under statutory authority. They have intervened in many of the leading cases in this area[4]. In June 2009 JUSTICE published Secret Evidence, a 238-page report on the use of "closed proceedings" and "closed material" in UK courts.

PUBLIC INTEREST IMMUNITY AND THE SELF DEFEATING NATURE OF THE SUGGESTED "CLOSED MATERIAL" PROCEDURE

(a) the salient features of law relating to public interest immunity

9. Public interest immunity arises whenever the public interest in disclosure of information which is relevant to the determination of an issue in a case is outweighed by the public interest in the information being withheld. It does not arise merely because disclosure of any information is likely to damage the public interest. It thus trite law (as the Respondents have accepted[5]) that it arises only when the balance to be struck in the public interest requires information to be withheld.

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4 including ***Secretary of State for the Home Department v MB*** [2008] 1 AC 440, ***A and others v United Kingdom*** [2009] ECtHR, 19 February, ***RB (Algeria) and others v Secretary of State for the Home Department*** [2009] UKHL 10 and ***Secretary of State for the Home Department v AF and others*** [2009] UKHL 28.

5 See paragraph [12(a)] of their skeleton argument for the Divisional Court.

10. When public interest immunity applies to information it may not be given in evidence[6] and any document to the extent that it contains such information must be withheld from disclosure[7]. As Lord Simon of Glaisdale put it[8],

> "It is true that the public interest which demands that the evidence be withheld has to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material...; but once the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted."

The rule that any information which public interest immunity requires to be withheld (after the appropriate balancing exercise has been conducted) may not be used in evidence has endorsed on more than one subsequent occasion by the House of Lords[9]. This rule ensures that there is "equality of arms" between litigants or (in terms of CPR 1.1(2)(a)) "that the parties are on an equal footing". Thus, as the Respondents themselves have put it[10],

> "if the..balance falls in favour of withholding any item of information then it cannot be disclosed or used in any way in the litigation. The trial must be conducted in ignorance of its content, irrespective of whether it assists or undermines either side's argument... By definition, a successful PII claim results in material being withheld both from the other side and the court."

11. As Lord Scarman has said, public interest immunity is a matter of substantive "public law, not private right"[11]. Accordingly it is the duty of the court to give effect to such immunity if applicable *proprio motu*, even if the parties do not wish it to[12].

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6 See eg ***Duncan v Cammell Laird & Co*** [1942] AC 624 per Viscount Simon at p643; ***Gain v Gain*** [1961] 1 WLR 1469 at p1471; ***in re Grosvenor Hotel, London No 2*** [1965] 1 Ch 1210 per Lord Denning MR at p1243d.

7 See eg ***Science Research Council v Nasse*** [1980] AC 1028 per Lord Wilberforce at p1067a

8 ***R v Lewes Justices*** [1973] AC 388 at p407.

9 see eg ***Alfred Crompton Amusement Machines Ltd v the Commissioners of Customs and Excise*** [1974] AC 405 per Lord Cross (with whom the other members of the Appellate Committee agreed) at p434b-c; ***R v the Chief Constable of the West Midlands ex p Wiley*** [1995] AC 274 per Lord Woolf at p298b-e, 301b-d

10 See paragraph [12(b)] and [40] of their skeleton argument before the Divisional Court.

11 Per Lord Scarman ***Science Research Council v Nasse*** [1980] AC 1028 at p1087h.

12 See eg ***Duncan v Cammell Laird & Co*** [1942] AC 624 per Viscount Simon at p642; ***in re Grosvenor Hotel, London No 2*** [1965] 1 Ch 1210 per Salmon LJ at p1256b-c; ***R v Lewes Justices*** [1973] AC

(b) the self defeating nature of the suggested "closed material" procedure if the court complies with its duty to apply the law

12. The "closed material" procedure is self defeating if the court complies with its duty to apply the law. Let it be assumed that a "closed material" procedure was ordered. Then:

(1) the only reason for information being considered within that procedure is that at least *prima facie* it may attract such immunity (as its disclosure is likely to harm the public interest in some way);

(2) the court is itself accordingly required to consider whether each item of information within it should be the subject of public interest immunity: see paragraph [11] *supra*;

(3) the balancing exercise that the court must carry out in respect of each item of information within the "closed material" procedure may have only one of two outcomes:

  (a) the court may decide on balance that the information should be disclosed (with the result that it ceases to be information to be considered within the "closed material" procedure); or

  (b) the court may decide on balance that the information should not be disclosed (with the result that it ceases to be information which may be considered by the court at all in determining the case on the merits: see paragraph [10] *supra*);

(4) accordingly there will never be any information within the "closed material" procedure which ever falls to be considered by the court when determining the merits of the case.

13. It follows, therefore, that, even if the court had power to order a "closed material" procedure it would be self defeating. The reason for adopting such a procedure is to enable the court to determine a case on the merits by reference to information which remains closed to the other party. But its result will always be that there will be no information within the "closed material" procedure which ever falls to be considered by the court when determining the merits of the case.

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388 per Lord Simon at p407; ***Science Research Council v Nasse*** [1980] AC 1028 per Lord Edmund Davies at p1074c-d, per Lord Fraser at p1082b.

14. The "closed material" procedure can only work in practice in relation to evidence, therefore, if the court refuses to apply the substantive public law governing public interest immunity contrary to its own duty to do so, as the example above in relation to evidence illustrates. A "closed material" procedure is thus not an alternative procedure to a procedure for dealing with claims for public interest immunity: it involves a refusal by the court to apply the substantive law.

15. It is also productive of consequences that cannot represent a proper exercise of any judicial discretion (if the court has one). The effect of keeping material "closed" to which the court does not find that public interest immunity applies is absurd. It means that information is not disclosed when the court has found (a) that is in the public interest that it should be and (b) that to withhold it would impede the fair disposal of the claim and put the parties on an unequal footing (as consideration of the rules relating to disclosure and inspection (in paragraphs [51]-[55] below) illustrates).

THE COURT'S POWERS

(a) introduction

16. The High Court is a statutory creation. It is not clear what power Silber J thought the court has which it may be exercising when it orders a "closed material" procedure. But it appears that he may have accepted the Respondents' case that it could be done in exercise of the court's "inherent power" to control its own proceedings (a power which is preserved by section 19(2)(b) of the Senior Courts Act 1981). Moreover he appears to have thought that this "inherent power" was "unlimited" provided it was exercised to prevent the court's procedure being used to achieve injustice: see the judgment at [15].

17. This involves a number of fundamental misconceptions about the court's inherent power to regulate its own proceedings.

(1) "Where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction": ***Tombstone Ltd v Raja*** [2008] EWCA Civ 1444 at [78].

(2) The Civil Procedure Rules are rules which may regulate the practice and

procedure of the Court but they may not modify the substantive law (other than the rules of evidence in certain respects) and in particular, given 'the principle of legality', they may not modify the fundamental rights that a party may have as a matter of substantive law. Accordingly decisions in the exercise of powers conferred by the Civil Procedure Rules must be compatible with such fundamental rights and in accordance with the rules relating to evidence (to the extent that the Civil Procedure Rules have not modified them).

(3) The inherent power of the court which remains in matters not governed by the Civil Procedure Rules may not be used to "arrive at a different outcome from that which would result from an application of the rules": ***Tombstone Ltd v Raja*** [2008] EWCA Civ 1444 at [78]. Moreover this inherent power, since it also relates only to the practice and procedure of the court not to the substantive law which the court must apply, may not be exercised inconsistently with the substantive law and in particular the fundamental rights that a party may have under it.

18. The "closed material" procedure is incompatible with the fundamental rights that a party to a civil claim has as a matter of substantive law as well as the law relating to public interest immunity (which is not a mere "rule of evidence" but which in any event the Civil Procedure Rules have not even purported to modify).

(b) the Civil Procedure Rules, practice directions and decisions under them

19. Historically the judges of the superior courts have had an inherent power to make general rules of court for regulating their own proceedings. As Lord Devlin stated[13]

> "the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides."

20. A statutory power to make rules for the superior law courts and later for the Supreme Court, first introduced in 1830, continued to be vested solely in members of the judiciary until

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[13] See ***Connelly v the DPP*** [1964] AC 1254 at p1347.

1894[14]. The Rules Committee of the Supreme Court (which was then expanded to include others) had statutory power to make rules "for regulating and prescribing the procedure..and the practice to be followed" by the court[15]. But this power was not one that enabled the substantive law to be altered. It merely enabled it to be applied fairly and conveniently. Thus, for example, a rule requiring the court not to order disclosure of a document if a statement was made on behalf of the Crown that to do so would be injurious to the public interest was found to be *ultra vires* by the Court of Appeal in ***In re Grosvenor Hotel, London (Nº 2)*** [1965] 1 Ch 1210. As Lord Denning MR put it (at p1243)[16],

> "What then are the powers of the Rule Committee? They can make rules for regulating and prescribing the procedure and practice of the court, but they cannot alter the rules of evidence, or the ordinary law of the land. The law as to Crown privilege is not mere procedure or practice. It may perhaps be said to be a rule of evidence, but I would rank it higher. It is a principle of our constitutional law which is to be observed in the administration of justice, not only when a witness is called to give oral evidence, but also when a party is called upon to give discovery...Suppose the Rule Committee purported to abolish Crown privilege altogether. I should have thought it was quite beyond their powers. So also if the Rule Committee extends it beyond a scope hitherto known."

21. The statutory power to make rules of court "governing the practice and procedure to be followed in" the High Court "with a view to securing that..the system of civil justice is accessible, fair and efficient" is now vested in the Civil Procedure Rules Committee[17]. That Committee's powers have been extended, however, so that the rules made "may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules"[18]. But this is an incidental power intended to enable effect to be given to rules made to govern the practice and procedure to be followed in the court: see ***General Mediterranean Holdings SA v Patel*** [2000] 1 WLR 272 at p292g-293f.

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14 See IF Jacob *The Inherent Jurisdiction of the Court* (1970) CLP 23 at p33-34.

15 See section 99(1)(a) of the Judicature Act 1925 and section 84 of the Supreme Court Act 1981 as enacted.

16 See also per Harman LJ and Salmon LJ at p1249f and1262d both of whom recognised (i) that rules regulating practice and procedure may not alter the substantive law and (ii) that public interest immunity is a matter of substantive law.

17 See section 1(1) and 2 of the Civil Procedure Act 1997.

18 See paragraph 4 of Schedule 1 to the Civil Procedure Act 1997.

22. Further the "principle of legality" applies to what rules may be made (and thus what decisions can be made in the exercise of powers conferred by them). That principle is that, in the absence of express language or necessary implication to the contrary, even the most general words are intended to be subject to the basic rights of an individual[19]. As Lord Browne-Wilkinson explained[20],

> "statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions...As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication....Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice".

23. Thus the generally expressed powers of the Civil Procedure Rules Committee do not extend to abolishing or modifying rights conferred by the substantive law even when they may be described as part of the rules of evidence, such as the right to legal confidentiality[21] (the result of legal professional privilege), as Toulson J held in ***General Mediterranean Holdings SA v Patel*** *supra*[22], or the right not to incriminate oneself (the product of the privilege against self-incrimination). Equally decisions taken under them may not do so. No judge, for example, could make an order which had the effect of depriving a party of these rights because he thought it would further the overriding objective in a case claiming that the general power conferred by CPR 3.1(2)(m), to make "any order for the purpose of managing the case and furthering the overriding objective", authorised him to do so.

24. Neither the powers of the Civil Procedure Rules Committee nor decisions made in the exercise of powers conferred by the rules that they may make may thus abolish or modify an individual's rights conferred by the substantive common law which are not mere matters of

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19 See eg per Lord Hoffmann ***R v the Home Secretary ex p Simms*** [2000] 2 AC 115 at p131.

20 ***R v the Home Secretary ex p Pierson*** [1998] 2 AC 539 at p573-4.

21 See ***R (Morgan Grenfell & Co Ltd) v IRC*** [2002] UKHL 21, [2003] 1 AC 563 per Lord Hoffmann at [8].

22 See to like effect: ***B and others v. Auckland District Law Society and another*** [2003] UKPC 38, [2003] 2 AC 736 at [56]-[58].

procedure or practice, such as the right of access to the court[23], the right to know another party's case and the right to be heard in response to it. Nor may civil procedure rules abolish or modify other aspects of substantive law which are not merely a product of the rules of evidence, such as public interest immunity (as Lord Denning indicated).

25. It may be noted, however, that the Civil Procedure Rules have not purported to modify the law relating to public interest immunity, even if it could be described merely as a rule of evidence (contrary to Lord Denning's view). Moreover, although the Court has been given power under CPR 32.1 to control evidence, a power which it may use to exclude evidence which is otherwise admissible, it has been given no power to admit evidence which the law requires to be excluded from the court's consideration (such as information the subject of public interest immunity).

26. Directions as to practice and procedure may also be made under the inherent jurisdiction of the court by Heads of Division, although they are now subject to the approval of the Lord Chancellor and the Lord Chief Justice[24]. In addition other directions as to practice and procedure may now be given with the agreement of the Lord Chancellor under section 5(1) of the Civil Procedure Act 1997 by the Lord Chief Justice or a judicial office holder whom he may nominate[25]. But, like the former Rules of the Supreme Court, such directions as to practice and procedure may not modify the substantive law or rights conferred by it.

(c) the inherent powers of the court

27. As Lord Morris once stated[26],

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to

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23 Cf ***R v the Home Secretary ex p Pierson*** [1998] 2 AC 539 per Lord Browne Wilkinson at p575 and Lord Steyn at p589.

24 See section 5(2) and 9(2) of the Civil Procedure Act 1997; ***R (Ewing) v the Department of Constitutional Affairs*** [2006] EWHC 504 Admin, [2006] 2 All ER 993, at [13].

25 See section 5(1) and 9(2) of the Civil Procedure Act 1997 and Schedule 2 to the Constitutional Reform Act 2005.

26 ***Connelly v the DPP*** [1964] AC 1254 at p1301.

> enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

28. The inherent power of the court, which the High Court retains, is thus, as Lord Diplock said[27], a power which the court has to do "acts which it needs must have power to do in order to maintain its character as a court of justice". It is thus a subsidiary power which may be used to facilitate the discharge of the court's jurisdiction. As Sir Jack Jacob stated[28],

> "The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal and *not of substantive law*; it is invoked in relation to the process of litigation." (Emphasis added)

29. As indicated above, there are three important limitations on this inherent power of the court: (i) "where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction"[29]; (ii) the inherent power of the court which remains in matters not governed by the Civil Procedure Rules may not be used to "arrive at a different outcome from that which would result from an application of the rules"[30]; and (iii), since it too relates only to the practice and procedure of the court and not to the substantive law which the court must apply, the inherent power may not be exercised inconsistently with the substantive law and in particular the fundamental rights that a party may have under it.

(d) the relevant rights of a party to a civil claim

i. audi alteram partem

30. It is well established, as Lord Fraser put it (in a speech with which all the other members of the Appellate Committee agreed)[31], that

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27 ***Bremner Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation Ltd*** [1981] AC 909 at p977h.

28 See IF Jacob *The Inherent Jurisdiction of the Court* (1970) CLP 23 at p24; Halsbury's Laws of England 5th ed Vol 11 *Civil Procedure* at [15]; *Civil Procedure* Vol 2 at [9A-68].

29 ***Tombstone Ltd v Raja*** [2008] EWCA Civ 1444 at [78]

30 ***Tombstone Ltd v Raja*** [2008] EWCA Civ 1444 at [78]

31 ***Re Hamilton*** [1981] 1 AC 1038 at p1045.

> "One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of *audi alteram partem* which applies to all judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication."

Moreover, as the Privy Council stated in ***Kanda v the Government of Malaya*** [1962] 1 AC 322 at p337-8

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in [the relevant party] to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases...It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing."

31. It is thus a fundamental principle of natural justice with which a civil court must comply when determining the merits of a dispute between parties (in the absence of any enactment to the contrary) (i) that a party has a right to know the case against him; (ii) that a party has a right to know what the evidence against him is; (iii) that a party must have an opportunity to respond to any such evidence and to any submissions made by that other party adverse to his case and, accordingly, (iv) that another party may not advance contentions or adduce evidence to the court of which that party is kept in ignorance. The "closed material" procedure involves the violation of each of these rights which a party has as a matter of substantive law.

a. a party's right to know another party's case

32. In relation to a party's right to know the case against him, the Civil Procedure Rules require a defendant (such as the Respondents in this case) who wishes to defend all or part of a claim to file a defence: CPR 15.2. What such a defence must contain is specified in CPR 16.5:

> **"(1) In his defence, the defendant must state—**

(a) which of the allegations in the particulars of claim he denies;

(b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and

(c) which allegations he admits.

(2) Where the defendant denies an allegation—

(a) he must state his reasons for doing so; and

(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.

(3) A defendant who—

(a) fails to deal with an allegation; but

(b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,

shall be taken to require that allegation to be proved."

33. CPR 15.6 provides that

"A copy of the defence must be served on every other party."

There is no provision in the Civil Procedure Rules governing civil claims that permits only part of the defence to be served on any other party. Precisely because the court will have the defence filed, so equally a copy of what the court has must be served on the other parties.

34. True it is that CPR 6.28 provides that:

"The Court may dispense with service of any document which is to be served in the proceedings."

This does not permit the court to dispense with service of part of the document (such as would be required in the case of a closed defence). More significantly, however, this rule does not permit the court to deny a party his right to know what another party's statement of case adverse to him contains. As explained above, the Civil Procedure Rules are rules governing the practice and procedure of the court. The empowering provisions and the rules themselves are in general terms which may not be taken (consistently with the "principle of legality") to diminish the fundamental rights that a party has or to authorise the court to do so. Moreover there is no need to interpret CPR 6.28 to permit that to occur if it is to be given effect. As May

LJ has said[32], "there will be plenty of commonplace circumstances in which formal service or re-service of a document may be pointless and where it will be sensible and economic for court to dispense with it".

35. Such inherent powers as the court may have cannot be exercised inconsistently with the Civil Procedure Rules (which require a copy of any defence to be served on the other parties) or with the substantive rights of a party (such as the right to notice of another party's case): *supra*.

36. Accordingly the Court has no power in a civil claim to permit a party to conceal all or part of its statement of case from another party and to reveal the part so concealed only to the court.

37. Silber J simply failed to deal with this issue. He merely noted (at [79]) that "in this case defences have been served to the claims of all claimants which comply with CPR Part 16.5 and no complaint has been made that they do not comply with the CPR." This does not deal in any event with the apparent intention of the Respondents to serve further "closed defences". But, more significantly, it does not engage with the question raised by the preliminary issue, namely whether a court has power to permit a party to rely on a statement of his case without disclosing it to other parties where disclosure is likely to harm the public interest.

38. In this connection it may be noted that public interest immunity has never apparently been applied to a party's statement of case. That is unsurprising: normally no question of public interest immunity arises unless, and until, it has been established that the information is relevant to, and may be necessary to determine, the issues in a case. These are defined by the parties' statements of their case. In ***Lamothe v the Commissioner of Police of the Metropolis***[33], however, Lord Bingham outlined the options available to a defendant who may feel

> "inhibited from disclosing information [in his defence] which would be the proper subject of a claim for public interest immunity. The solution to that problem is to give such general particulars as the defendant can give, without disclosing any information which would be the proper subject of such a claim. If it is contended that the particulars are still inadequate,

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32 ***Godwin v Swindon BC*** [2002] 1 EWCA Civ 1478 [2002] 1 WLR 997 at [50].

33 [1999] EWCA Civ 3034.

argument can take place at that stage [on whether to strike them out on that ground]."[34]

Lord Bingham did not identify partial concealment of the defence from the other party as an option in such a case. Nor consistently with the fundamental principles of justice could he have done so.

b. a party's right to know and have an opportunity to challenge the evidence on which another party may rely in the determination of the case on the merits

39. As Roche LJ once said[35],

> "whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a Court or by a Board, or any body of persons, it is necessary and essential in the words of Lord Loreburn in *Board of Education v Rice*, which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard."

40. Thus, as Lord Bingham has stated[36],

> "The ordinary principle governing the conduct of judicial inquiries in this country is not, in my opinion, open to doubt. In *In re K (Infants)* [1963] Ch 381, 405-406, Upjohn LJ expressed it thus:
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> > "It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."
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> On appeal to the House in the same case [1965] AC 201, Lord Devlin referred, at p 237, to "the

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34 See also per Sir Stephen Brown P ***Halford v Sharples*** [1992] ICR 583 CA at p594h.

35 See ***Errington v the Minister of Health*** [1935] 1 KB 249 CA at p280-1.

36 See ***R (Roberts) v Parole Board*** [2005] 2 AC 738 at [16].

fundamental principle of justice that the judge should not look at material that the parties before him have not seen", and at p 238, referring to "the ordinary principles of a judicial inquiry", he continued:

> "They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice. The rule in point here is undoubtedly one of those."

Lord Mustill, with the agreement of all other members of the House, spoke in similar vein in *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 603-604, when he described it as

> "a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer."

Later in the same opinion, at p 615, he said:

> "It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party.""

41. There is nothing new in these principles. As Scarman J (as he then was) said[37]

> "For a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see or hear, and thus to challenge, explain or comment upon, seems to us to strike at the very root of the judicial process."

Moreover, as the Court of Appeal has stated[38]

> "Both the common law and the Convention regard fairness as including the need for the court

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37 ***Brinkley v Brinkley*** [1965] P 75, 78.

38 ***Owners of the ship 'Bow Spring' v Owners of the ship 'Manzanillo II'*** [2004] EWCA Civ 1007 [2004] All ER (D) 522 at [58]

> to know, before it reaches a conclusion, what the parties have to say about the issues and the evidence which goes to them. As the Strasbourg court put it in *Kr Ma v Czech Republic* (35376/97; 3 March 2000, para 40): "The concept of a fair hearing ... implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed with a view to influencing the court's decision.""

42. When previous attempts have been made to persuade a court to hear evidence in the absence of one of the parties, they have been found (unsurprisingly) to be an invitation to act unlawfully. Thus, for example Sir John Donaldson when sitting in the National Industrial Relations Court[39], when dealing with such an invitation, noted that

> "Mr. Vinelott submits on that, that there is no power to receive evidence in a form which will deny to the parties to the proceedings access to it. He submits that in the context of the work of this court and, indeed, of almost all the work of all courts, to do so would be a denial of the rules of natural justice. He points out that there are exceptional cases where this has been done, but only where the court is concerned with discharging a duty wholly different from that being discharged by this court, which is resolving rights as between parties. The only exception in the history of the courts has been where the court has been acting in a quasi-paternal capacity - for example, in its jurisdiction to look after children and persons who are under a disability of one sort or another - and even then the evidence must not come from one of the parties, to be used against the other, who is to be left in ignorance of it. It comes from disinterested, outside bodies such as, it may be, doctors or social workers.... We have no doubt whatever that [this submission] is abundantly right...it would be a step of the greatest seriousness to hear evidence on behalf of one party against another without that other party having access to it. Whether Parliament would ever agree to such a step we know not, but certainly there is no evidence that Parliament has ever considered the matter or authorised this court to do it. We are not recommending whether it should be done, at all; we are expressing no view about it. What we are saying is that there is no power to do it in this court and, for our part, we doubt whether there is any power to do it in any court."

43. Accordingly the Court of Appeal in its judgment in ***Lamothe v the Commissioner of Police of the Metropolis*** *supra*, which was given after the coming into force of the Civil Procedure Rules, allowed the appeal of claimants against whom a judgment had been given on the basis of material that they had never seen nor had an opportunity to challenge or address in argument because, as Lord Bingham put it, "it violated fundamental rights of the claimants and

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[39] ***Midland Cold Storage v Turner*** [1972] ICR 230 234-5.

cannot be allowed to stand."

44. Thus, under the Civil Procedure Rules, the general rule is that a fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public subject to any provision to the contrary or to any order of the court: CPR 32.2. There are, of course, cases in which a trial, or part of it, may be held in private (something which does not exclude a party from it and something which does not mean that the information disclosed to the court and the proceedings necessarily remain confidential): see CPR 39.2(3)[40]. Nonetheless CPR 32.4 provides that

> **"The Court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the evidence intends to rely on in relation to any issues of fact to be decided at the trial."**

Although the court has power to dispense with service of such a document under CPR 6.28, it may not do so in order to keep a party in ignorance of its contents (as explained above in relation to service of a statement of case). If such a statement is not served in respect of an intended witness within the time specified by the court, the witness may not be called to give oral evidence unless the court gives permission. It could likewise not be ground for giving such a permission for the reasons set out above that the statement had not been served in order to keep a party in ignorance of its contents[41].

45. Although Silber J referred to CPR 32 and CPR 39 in [80], he did not address the provisions of the Civil Procedure Rules that require evidence to be served in advance on other parties. Nor did he explain how the "closed material" procedure could be reconciled with the fundamental right of a party to know the evidence on which another party relies and to challenge it. Nor did he address how it was reconcilable with the duty of a court not to receive evidence from one

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[40] see CPR 39.2(3), PD 39 at [1.9], ***Department of Economics, Policy and Development of the City of Moscow and another v Bankers Trust Co and another*** [2004] EWCA Civ 314 [2005] 1 QB 207 (dealing also with publicity for judgments) per Mance LJ at [11]-[27] CA. There are also similar provisions which enable the court to direct that a witness statement which stands as evidence in chief need not be open to inspection by the public during the course of the trial (as it is otherwise required to be) in CPR 32.13.

[41] Factors which may be relevant are set out in CPR 3.9(1).

party of which another party is kept in ignorance. As Hobhouse J (as he then was) stated[42]

> "The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person, and one party is asking the tribunal for an order which will affect and bind another. Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court.
>
> A recent illustration of this principle is *WEA Records Ltd. v. Visions Channel 4 Ltd*. [1983] 1 WLR 721, which concerned an application for an Anton Piller order. Sir John Donaldson M.R. said, at p. 724:
>
> > "However we are told that counsel also revealed to the judge certain information which may well have been relevant, but which was so confidential and sensitive that the plaintiffs considered that it could not properly be revealed to the defendants at a later stage. I do not know what this information was, but I cannot at the moment visualise any circumstances in which it would be right to give a judge information in an ex parte application which cannot at a later stage be revealed to the party affected by the result of the application. Of course there may be occasions when it is necessary, for example, to conceal the identity of informants, but the judge should then be told that this information cannot be given to him and the judge will then have to make up his mind to what extent he is prepared to rely upon information coming from anonymous and unidentifiable sources."

c. a party's right to attend and participate in the trial of his case

46. The application of the principles described above does not necessarily require there to be an oral hearing in all cases. The "closed material" procedure envisaged by the preliminary issue unsurprisingly contemplates such a hearing (which may in fact be a hearing in front of a jury).

47. The right to appear before and address a court, including the right to call and examine witnesses, is a 'right of audience'[43] and its exercise is a reserved legal activity under the Legal

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42 ***Pamplin v Express Newspapers*** [1985] 1 WLR 689 at p691.

43 See paragraph 3 of Schedule 2 to the Legal Services Act 2007.

Services Act 2007[44]. Whether a person is entitled to exercise any such right is now to be determined solely in accordance with the provisions of that Act[45]. Among those who are entitled to exercise that right in relation to any proceedings is a party to them who would have had a right of audience if the 2007 Act had not been passed in that person's capacity as such a party[46].

48. As Jenkins LJ (as he then was stated) in ***Grimshaw v Dunbar*** [1953] 1 QB 408 at p416

> "a party to an action is prima facie entitled to have it heard in his presence; he is entitled to dispute his opponent's case and cross-examine his opponent's witnesses, and he is entitled to call his own witnesses and give his own evidence before the court. Prima facie that is his right".

This right gives effect in the context of a trial to the requirement to enable a party to be present during the trial and to have the opportunity to contradict another party's case adverse to him by evidence and submissions. That right was no doubt described as a *prima facie* right since a court must have the power to exclude a party from the trial if he abuses that right when present by acting in a manner which frustrates the fair and efficient conduct of the hearing. Moreover[47]

> "the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

But, even when a court may decline to hear an individual in contempt, it does not follow that the court is entitled to deprive him of his right to be present if he will not disrupt the proceedings.

49. There can be no doubt that a party has a right to attend and participate in the trial of his

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44 See section 12(1) of the Legal Services Act 2007.

45 See section 13(1) of the Legal Services Act 2007.

46 Such a person has that right as an 'exempt person': see section 13(2)(b) and 19 of, and paragraph 1(6) of Schedule 3 to, the Legal Services Act 2007.

47 See ***X v Morgan-Grampian Ltd*** [1991] 1 AC 1 per Lord Bridge at p46 (approving the earlier statement of the law by Lord Denning) and per Lord Oliver at p50.

case the exercise of which cannot be denied merely because another party proposes to adduce evidence in his absence which it is claimed is likely to harm the public interest and which the judge should take into account when determining the case. It is one thing for the judge to consider whether such evidence may be admissible or whether it may not be adduced given any public interest immunity which it may attract in the absence of a party. But, once that balancing exercise has been completed, the evidence is either admissible or inadmissible in the trial which the party has a right to attend and exercise his right of audience in.

d. a party's right to material that may support his case or harm another party's case which another party may have

50. There is no automatic right to disclosure or inspection of documents held by another party under the Civil Procedure Rules. An order for disclosure is required. That order (if made) will normally be for standard disclosure. But the Court has power to dispense with, or to limit, standard disclosure[48]. Moreover a person may apply, without notice, for an order permitting him to withhold disclosure of a document (if ordered) on the ground that disclosure would damage the public interest in accordance with CPR 31.19 (1), (6)-(7). Such an order, if made, must not be served on, and is not open to inspection, by any other person[49].

51. Where a document has been disclosed by a party who still has control of it, the party to whom it is disclosed has a right to inspect it unless it would be disproportionate to the issues in the case or the party disclosing the document has a right or duty to withhold inspection of it[50]. This includes documents mentioned in statements of case, witness statements and affidavits[51]. The procedure for claiming a right or duty to withhold inspection of a document or part of a document is set out in CPR 31.19 (3)-(7).

52. These Rules have been made against the background of certain basic principles. As Lord Salmon said[52]

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48 See CPR 31.5.

49 See CPR 31.19(2).

50 See CPR 31.3.

51 See CPR 31.14, ***Expandable Ltd v Rubin*** [2008] EWCA Civ 59, [2008] 1 WLR 1099.

52 ***Science Research Council v Nasse*** [1980] AC 1028 at p1071e-f; cf also per Lord Wilberforce at p1066a.

> "If the tribunal is satisfied that it is necessary to order to certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then, in my opinion, the law requires that such an order should be made".

The basic structure of the law of evidence recognises, however, (as reflected in the Rules themselves), that a party may have a right or duty to withhold inspection in certain cases and also that applications may be made to withhold disclosure and/or inspection of a document where that would damage the public interest. The law recognises that such disclosure and inspection must be withheld, and public interest immunity attaches, if the court concludes that public interest so requires having considered the competing public interests that may be involved.

53. The "closed material" procedure requires documents to be withheld from disclosure and inspection if their disclosure would be likely to harm the public interest in some way *regardless* of how that balance may be struck. It thus contemplates that a court may refuse to order disclosure and inspection of documents to a party when (i) that is necessary for the fair disposal of his claim (when, for example, it will provide documents on which the other party relies or documents which adversely affect that other party's case or which will support his own case) and (ii) the public interest in disclosure and inspection outweighs the public interest in withholding them from disclosure and inspection. In other words the "closed material" procedure would require a court to make an order which was contrary to the public interest, would impede the fair disposal of the claim and would put the parties on an unequal footing.

54. That result is not one that the court could produce in the exercise of any discretion under Rules. The fallacious premise underlying the Respondents' approach is the same as that rejected by the House of Lords in ***Alfred Crompton Amusement Machines Ltd v Custom and Excise Commissioners (N^{o} 2)*** [1974] AC 405. In that case objection was raised on the basis that damage (namely a breach of a duty of confidence) would be caused if documents were disclosed and inspected. But, as the House of Lords held, such damage of itself did not mean that documents may be withheld from disclosure and inspection if necessary for the fair disposal of the proceedings without consideration of the competing public interest in making them available. The Respondents' case is equally an impermissible invitation to the court only to consider one element in the balance which the court is required to strike and to ignore the law on public interest immunity when considering disclosure and inspection.

55. The inherent power of the court may not be exercised in relation to decisions to be made under the Civil Procedure Rules nor may it be exercised to produce a result inconsistent with that which would be arrived at under those Rules. But in any event the inherent power of the court relates to practice and procedure, not to the substantive law. Accordingly the court has no inherent power to reach decisions which do not give effect to the law relating to public interest immunity. But, even if it did, an approach which produces the result described above would not prevent any abuse of the court's process or defeat any attempt to thwart it. It would itself frustrate the proper exercise of the court's jurisdiction.

56. Neither the Civil Procedure Rules nor the court's inherent jurisdiction gives the court any power to refuse to apply the law relating to public interest immunity or to refuse disclosure or inspection where it would otherwise be ordered merely on the ground that it would be likely to harm the public interest regardless of whether or not the public interest on balance requires them to be withheld.

e. a party's right to receive a statement of the court's reasons for its decision in his case

57. In determining a civil claim on the merits the judge has a duty to give the reasons for his decision at common law[53]. As Lord Phillips MR stated when giving the judgment of the Court of Appeal[54], "we would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost." The failure to give reasons is thus a good self standing ground of appeal[55]. Indeed without such reasons a party will not know whether the judge has gone wrong on the law or on the facts. Moreover reasoned judgments allow the public to be informed about, and to criticise, the administration of justice.

58. The Court has power to sit in private when giving judgment and section 12 of the Administration of Justice Act 1960 specifies when the publication of information relating to proceedings before any court sitting in private may be a contempt of court. But (unsurprisingly) neither statute nor the rules make any provision for a party to be kept in ignorance of any judgement in his or her case or to be denied any part of the reasons for it.

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53 See eg *Civil Procedure* at [40.2.5] and [52.11.5].

54 ***English v Emery Reimbold & Strick Ltd*** [2002] EWCA Civ 605, [2002] 1 WLR 2409, at [16].

55 See ***Flannery v Halifax Estate Agencies Ltd*** [2000] 1 WLR 377 at p381g-h.

59. There is equally no inherent power to keep part of a judgment secret from a party. To do so would be incompatible with his right to the reasons for the Court's decision in his case.

(e) Parliamentary modification of a party's rights

60. Parliament has found it necessary to legislate to give those empowered to make rules of court the power to disapply these rights and ordinary rules.

61. In relation to control orders, for example, Schedule 1 to the Terrorism Act 2005 provides *inter alia* that:

> "2. A person exercising the relevant powers must have regard, in particular, to..(b) the need to secure that disclosures of information are not made where they would be contrary to the public interest.
>
> 4. (1) Rules of court made in exercise of the relevant powers may, in particular—
>
> (a) make provision about the mode of proof in control order proceedings and about evidence in such proceedings;
>
> (b) enable or require such proceedings to be determined without a hearing; and
>
> (c) make provision about legal representation in such proceedings.
>
> (2) Rules of court made in exercise of the relevant powers may also, in particular—
>
> (a) make provision enabling control order proceedings or relevant appeal proceedings to take place without full particulars of the reasons for decisions to which the proceedings relate being given to a relevant party to the proceedings or his legal representative (if he has one);
>
> (b) make provision enabling the relevant court to conduct proceedings in the absence of any person, including a relevant party to the proceedings and his legal representative (if he has one);
>
> (c) make provision about the functions in control order proceedings and relevant appeal proceedings of [special advocates]; and
>
> (d) make provision enabling the relevant court to give a relevant party to control order proceedings or relevant appeal proceedings a summary of evidence taken in his absence.
>
> (3) Rules of court made in exercise of the relevant powers must secure—
>
> (a) that in control order proceedings and relevant appeal proceedings the Secretary of State is required (subject to rules made under the following paragraphs) to disclose all relevant material;

(b) that the Secretary of State has the opportunity to make an application to the relevant court for permission not to disclose relevant material otherwise than to that court and [any special advocate];

(c) that such an application is always considered in the absence of every relevant party to the proceedings and of his legal representative (if he has one);

(d) that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest;

(e) that, where permission is given by the relevant court not to disclose material, it must consider requiring the Secretary of State to provide the relevant party and his legal representative (if he has one) with a summary of the material;

(f) that the relevant court is required to ensure that such a summary does not contain information or other material the disclosure of which would be contrary to the public interest;

(g) that provision satisfying the requirements of sub-paragraph (4) applies where the Secretary of State does not have the relevant court's permission to withhold relevant material from a relevant party to the proceedings or his legal representative (if he has one), or is required to provide a summary of such material to that party or his legal representative.

(4) The provision that satisfies the requirements of this sub-paragraph is provision which, in a case where the Secretary of State elects not to disclose the relevant material or (as the case may be) not to provide the summary, authorises the relevant court—

(a) if it considers that the relevant material or anything that is required to be summarised might be of assistance to a relevant party in relation to a matter under consideration by that court, to give directions for securing that the matter is withdrawn from the consideration of that court; and

(b) in any other case, to ensure that the Secretary of State does not rely in the proceeding on the material or (as the case may be) on what is required to be summarised.

(5) In this paragraph "relevant material", in relation to any proceedings, means—

(a) any information or other material that is available to the Secretary of State and relevant to the matters under consideration in those proceedings; or

(b) the reasons for decisions to which the proceedings relate."

It may be noted that:

(1) the rules are <u>required</u> (by virtue of paragraph 4(3)) to modify the law relating to public interest immunity. The issue under the rules which are thus required to be made is not whether public interest immunity applies to any relevant information so that it need not be disclosed and must not be taken into account

by the court. It is whether the Secretary of State should have permission not to disclose relevant material "otherwise than to [the] court and" any special advocate and thus whether he should have permission "to withhold relevant material from a relevant party to the proceedings or his representative (if he has one)[56]. A relevant party is anyone other than the Secretary of State[57]. If such permission is refused, the relevant material is still not required to be disclosed: the Secretary of State may elect not to do so[58]. He is thus enabled to veto a decision by the court that the public interest requires disclosure. If he elects not to disclose relevant material, the court is only required to give directions in such a case for securing that any relevant material is withdrawn from its consideration where it "might be of assistance to a relevant party"[59] and in other cases the Secretary of State is merely to be prevented from relying on it[60].

(2) Parliament also provided that rules made under this Act could enable proceedings to be conducted in the absence of any person, including a relevant party to the proceedings or his legal representative (if he has one)[61] and for "full particulars of the reasons for decisions" not to be given to such persons[62]. Parliament also provided that, in deciding whether or not to make such rules, regard had to be had to "the need to secure that disclosures of information are not made where they would be contrary to the public interest"[63].

62. The same empowering provisions were enacted by Parliament in relation to financial restriction proceedings under the Counter-Terrorism Act 2008 in sections 66 (generally) and 67 (disclosure) of that Act (save that, in relation only to disclosure, Parliament provided[64] that "nothing in [section 67], or in rules of court made under it, is to be read as requiring the court

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56 See paragraphs 4(3)(c) and 4(3)(g).

57 See paragraph 11of the Schedule.

58 See paragraph 4(4).

59 See paragraph 4(4)(a).

60 See paragraph 4(4)(b).

61 See paragraph 4(2)(b).

62 See paragraph 4(2)(a).

63 See paragraph 2(b).

64 See section 67(6) of the 2008 Act.

to act in a manner inconsistent with Article 6 of the Human Rights Convention.")

63. The rules made under each of these enactments are contained in Parts 76 and 79 respectively of the Civil Procedure Rules. In each case, among other provisions, they modify the overriding objective so that it, and so far as relevant any other rule, must be read and given effect in a way which is compatible with the duty of the court to ensure that information is not disclosed contrary to the public interest[65].

64. Silber J appears to have thought that these rules were intended either to make mandatory what the court otherwise had power to do or to make plain beyond argument that it had such powers in any event: see at [82] and [83]. Given that the duty to ensure that information is not disclosed contrary to the public interest referred to is intended to, and plainly does, reflect the provisions of the Acts that do not require that conclusion only to be reached after the public interest in withholding the information has been balanced against the public interest in its disclosure, that conclusion is untenable[66].

65. What Silber J did not address was the need for Parliamentary legislation to alter the law relating to public interest immunity and to enable rules to be made which diminish the rights which a party otherwise has as a matter of substantive law which CPR 76 and 79 indubitably do. Complaints were made that similar rules governing hearings before the Special Immigration Appeals Commission infringed the "principle of legality" by interfering with "a fundamental principle of legality in English domestic law"(which the Court of Appeal accepted was not open to doubt) by denying "the presence of the applicant throughout the process, and access by him and his advocates to all of the evidence". Those complaints were rejected on the basis that the relevant primary legislation clearly authorised such an interference. The complaints were not rejected on the basis that the rules themselves would otherwise have complied with that principle[67].

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[65] See CPR 76.2 and 79.2.

[66] Parliament could not be taken to have intended that rules might be made enabling the Commission to authorise disclosure of material over the disclosure of which Parliament had given the Secretary of State a veto after the court had decided in effect that the public interest requiredits disclosure.

[67] See ***MT (Algeria) v the Secretary of State*** [2007] EWCA Civ 808, [2008] 1 QB 533, at [14]-[17]; see also ***RB (Algeria) v the Home Secretary*** [2009] UKHL 10, [2009] 2 WLR 512, per Lord Hoffmann

(f) conclusion on the court's power to order a "closed material" procedure

66. The Court thus has no power under the Civil Procedure Rules to order a procedure in which it considers "closed material" when determining a civil claim in the absence of any enactment authorising it to do so. In the absence of a specific enactment enabling rules providing for such a procedure to be ordered, the Civil Procedure Rules (and decisions taken under them) may not alter the law relating to public interest immunity or the rights that a party has as a matter of substantive law in a manner which such a "closed material" procedure requires given the "principle of legality". Nor in any event have the Civil Procedure Rules purported to alter the law relating to public interest immunity or such rights in determining a civil claim in such circumstances.

67. The Court has no inherent power to make an order inconsistent with the result of applying the Rules in this manner and in any event the inherent power it has to regulate its own proceedings does not empower it to modify the law relating to public interest immunity or the rights which a party has as a matter of substantive law.

WHETHER THERE IS A PROBLEM TO WHICH THE "CLOSED MATERIAL" PROCEDURE IS A SOLUTION

68. The reasons advanced why the court should adopt a "closed material" procedure by the Respondents were these[68]:

> "13. In a case such as this where there is likely to be a very significant number of sensitive documents, traditional PII would..be both enormously time consuming (because it would require the redaction and the *Wiley* balance to be conducted in relation to each item of sensitive information) and it would be something of a blunt instrument: having considered each item of information, it would offer the court no alternative between admitting the material (thereby causing harm to the public interest) or withholding it (thereby compromising the administration of justice).
>
> 14. Furthermore, it is worth taking into account the possible consequences of adopting the traditional PII approach. The exclusion of relevant material is highly likely to put the Defendants in an impossible position, where they are unable properly to defend themselves. It would also

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at [181], Lord Hope at [226] and [231], Lord Brown at [252] and Lord Mance at [263].

[68] See their skeleton argument for the Divisional Court.

> operate to the disadvantage of the Claimants, to the extent that the excluded material assists their case. Alternatively, a decision to admit material despite the harm that would cause to the public interest might leave the Defendants with no real choice but to make comprehensive admissions - regardless of the strength of their defence - in order to avoid the necessity for such disclosure and the consequent harm. But, as Laws LJ observed in *Carnduff v Rock*, "a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all.
>
> 15. So, the adoption of the traditional PII approach in this case would be fraught with practical problems and also liable to lead to an unfair result."

69. Quite apart from the inherent speculation about the significance of applying the law relating to public interest immunity in this case (about which the court is in no position to make any assessment), the Respondents are in substance making three points about the consequences of the law relating to public interest immunity. These concern (i) the costs involved if the law relating to public interest immunity is to be applied properly; (ii) the consequences if it is found that any information is to be disclosed because it does not attract public interest immunity; and (iii) the consequences if it is to be found that any information is to be withheld because it does.

(a) the costs involved

70. The proper administration of justice will inevitably involve costs which should no doubt be minimised in the public interest and in the interests of the parties (so far as reasonably practicable and consistent with the proper administration of justice). But the proper administration of justice needs to comply with the rules of natural justice and give effect to the law, including the law on public interest immunity. No court should be deterred from requiring a party to identify any information which is necessary for the fair disposal of a claim that he wishes to withhold on the ground that it is likely to damage the public interest (as the duty imposed on parties by the law on public interest immunity itself requires), and from considering (as that law now requires) whether that information should nonetheless be disclosed in the public interest, because of the costs involved. These are costs that justice requires.

71. There is moreover no necessary saving of costs with a "closed material" procedure.

(1) The alleged saving may only arise if no consideration is given in that procedure by the court to (a) whether any relevant material (if disclosed) is likely to harm

the public interest and (b) whether its disclosure to the parties to the claim is nonetheless in the public interest. If the Respondents are suggesting that this exercise should not be undertaken they are in effect suggesting that the court has a power to adopt a procedure providing even less procedural protection for those denied knowledge of the information than Parliament has seen fit to provide in the statutory schemes mentioned above and that the State and its agents would be able to rely in "closed" proceedings on material they would not be able to rely on under those schemes.

(2) A "closed material" procedure is in fact likely to add to the costs that may otherwise be incurred. These costs are not simply associated with the costs of employing a special advocate or advocates (if appointed) but also with the inevitable complexity of dividing the claim and its determination into "open" and "closed" compartments.

(3) Moreover merely considering financial costs fails to reflect the unquantifiable costs involved in, for example, denying a party knowledge of the case against him, the opportunity to deal with it and knowledge of the reasons for any decision adverse to him.

(b) the consequences if it is found that any information is to be disclosed because it does not attract public interest immunity

72. The Respondents significantly misstated the consequences of a decision that on balance information should be admitted (in paragraph [13] quoted above) as "causing harm to the public interest". In fact, if a court decides that, on balance information in respect of which public interest immunity has been claimed should be disclosed to the parties, it will be because it is in the public interest that it should be. Accordingly in such a case not to disclose or to admit it in evidence will harm the public interest.

73. There is no sufficient reason why a special procedure which denies the basic rights of a party should be adopted to make material "closed" when on balance it is in the public interest that the information should be disclosed to the parties merely because there may otherwise be adverse consequences.

74. The Respondents' real complaint is that, faced with the fact that information should be

disclosed or admitted in evidence in the public interest, a party may prefer "to make comprehensive admissions" in order to avoid that occurring.

75. To contend that any party will have "no real choice" but to do so is an exaggeration. There is inevitably a choice to be made and it may be that both options are unpalatable to a party. But that position is not one that is unprecedented. A prosecution may be abandoned, and individuals who are in fact guilty may escape conviction and sentence, if a claim for public interest immunity fails and the prosecuting authority is not prepared for the relevant information to be disclosed. As Lord Bingham said (when giving the judgment of the Appellate Committee in ***R v H*** [2004] 2 AC 134 at [36(6)]), if limited disclosure renders a criminal trial process unfair to the accused

> "then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure."

The reason is precisely because there are public interests that may outweigh any damage to the public interest that disclosure may entail. As Lord Taylor CJ stated when giving the judgment of the Court of Criminal Appeal in ***R v Keane*** [1994] 1 WLR 746 at p751-2,

> "If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it."

In civil claims likewise the balance may equally require disclosure in the public interest. As Lord Brown put it in relation to article 6 of the ECHR in ***Home Secretary v MB*** [2007] UKHL 46, [2008] 1 AC 440, at [91] in connection with a control order,

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

Of course the relative weight of the public interest in disclosure in a civil claim may vary in the light of the nature of the claim, although there must be a strong public interest in determining claims against the state and its agents (as in this case) for false imprisonment, trespass to the person, conspiracy to injure, torture, misfeasance in public office and breach of Convention rights on the basis of full disclosure.

76. There are thus inevitably cases where a party must determine whether to support his case he must disclose information to another party which he would prefer not to. A party may have to elect, for example, whether or not to waive legal professional privilege in order to support his case[69]. Moreover, 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 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."

There is no reason for a different approach to be adopted when the State is involved, as the position in criminal trials demonstrates.

(c) the consequences if it is found that any information is to be withheld because public interest immunity applies

77. Silber J plainly did not envisage, and his decision does not mean, that the "closed material" procedure would only be adopted in the event that a fair trial cannot be had if that is the result of applying the law relating to public interest immunity. Indeed the Respondents' case is that such a procedure should be adopted without ever applying the law relating to public interest immunity to any material and regardless of whether a fair hearing may still be had if it was. Its use is thus not in fact contemplated as a last resort (as Silber J suggested).

78. In considering the consequences of withholding information on the ground of public interest immunity, it is instructive to consider how the court deals with other types of case in which evidence cannot be adduced because the common law prohibits it and the ways in which

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[69] see eg the Costs Practice Direction under Part 47 at [40.14] and the notes in Civil Procedure Vol 1 at [47.14.3].

those differ from a case involving public interest immunity.

79. A lawyer may be faced with a claim, for example, that he should pay another party's costs. His client may refuse to waive legal professional privilege. The information subject to that privilege may help the claimant or the lawyer. The court has recognised that in such a case the lawyer may be "at a grave disadvantage"; that judges must make full allowance for their inability to tell the whole story; and that no order should be made against a practitioner precluded by legal professional privilege from advancing his full answer without the court first satisfying itself that it is fair to do so in all the circumstances[70]. It should be noted in this respect that both the court and the claimant will know what questions cannot be answered, and what documents there are, in respect of which legal professional privilege has been claimed. In such cases the court may be able to reach a conclusion fairly that whatever may be protected by legal professional privilege cannot provide the lawyer with a defence. But in some cases it may not be able to do so and the claimant's case will accordingly fail.

80. The Court also has power (which is preserved by section 49(3) of the Senior Courts Act 1981) to stay any proceedings before it. The concept of a "fair trial" stay has been developed in cases where relevant evidence is the subject of Parliamentary privilege. In ***Prebble v Television New Zealand Ltd*** [1995] 1 AC 321, Lord Browne-Wilkinson giving the judgment of the Board stated (at p338) that

> "Their Lordships are of the opinion that there may be cases in which the exclusion of material on the grounds of Parliamentary privilege makes it quite impossible fairly to determine the issue between the parties. In such a case the interests of justice may demand a stay of proceedings. But such a stay should only be granted in the most extreme circumstances."

In such cases both the court and the parties will be aware of the material the subject of Parliamentary privilege as that privilege does not require the material to remain confidential: it requires that it should not be questioned in any proceedings. The House of Lords subsequently recognised that a "fair trial" stay could, and in some cases should, be granted in ***Hamilton v Al Fayed*** [2001] 1 AC 395 at p404c-g and 408b. However, as the Privy Council subsequently stated in ***Bolkiah & Ors v The State of Brunei Darussalam & Anor (Brunei Darussalam)*** [2007] UKPC 62 at [31]

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[70] See ***Medtcalfe v Mardell*** [2002] UKHL 27, [2003] 1 AC 120, at [23].

> "The grant of a stay of civil proceedings on the ground that there cannot be a fair trial is relief rarely granted. The Board is not aware that such relief has ever been granted or contemplated save where a defendant in defamation proceedings is precluded by the rules of parliamentary privilege from defending himself".

81. Cases involving public interest immunity are potentially different from each of these two types of case. In both these types of case, when determining the merits of a claim, the court and the parties will be aware that there is certain evidence which cannot be adduced. In the case of parliamentary privilege they will know what the material is. In the case of legal professional privilege, they will know what privilege has been claimed in respect of. By contrast in the case of public interest immunity, when considering a civil claim on its merits, a court may not take into account whether there is any relevant information which has been found to be subject to such immunity or what it may be. Such information is inadmissible as a matter of law. Moreover any party to whom it has not been disclosed may well not even be aware that there is any such information. Accordingly the circumstances would be most exceptional in which a court may decide on the basis of information which it is entitled to take into account that a stay should be granted on the ground that a fair trial is impossible given public interest immunity.

82. 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 (apparently on the wrong basis that the claim was "embarrassing or abusive"[71]). It is to be noted that the claimant accepted that, if this was the case, his claim should be struck out[72]. But in any event 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 claim was thus only struck out on the basis of the information available to all parties. It is

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[71] See per Laws LJ at [33]. In fact, if it was justified in that case, the appropriate remedy should have been a stay of the claim rather than its being struck out. The claim involved no abuse. Moreover circumstances might change enabling the claim to be subsequently litigated.

[72] See at [48.

at least possible in theory that there may be other cases in which it is the inevitable consequence of the statements of case and the evidence available all the parties to a claim as well as the court that it is plain (i) that there is information which will be withheld as a matter of public interest immunity (as the public interest in withholding it outweighs the harm to the public interest including the prejudice withholding it may cause to a fair trial) *and* (ii) that there can be no fair trial of the claim without that information. In such a case the court can grant a stay fairly on the basis of information available to all parties and its decision can be made the subject of an appeal in a transparent manner. The fact that no other case has been identified in which a claim has been struck out or stayed given the law relating to public interest immunity illustrates how exceptional such a situation is likely to be.

83. English law has thus recognised that a stay of the proceedings may be justified under the court's powers to grant a "fair trial" stay on the basis of material available to all parties. It has not recognised that a "closed material" procedure may be adopted instead when such a stay cannot be justified on such materials, undermining the basic rights of a party and the safeguards which protect the integrity of the administration of justice and public confidence in it. If a "fair trial" stay cannot be justified on the basis of material available to all the parties and the court, then the court should determine any civil claim on its merits on the basis of admissible evidence as it does in other cases where there is inadmissible evidence of relevance.

84. The adoption of a "closed material" procedure instead in such a case requires specific legislation (as with control orders).

85. But it would not be in the public interest in any event to provide for, or recognise, any general power to order a "closed material" procedure.

86. There is no evidence that there is any significant number of cases in which, as a result of public interest immunity being applied, an "incorrect" decision has been made. Indeed the cases in which that may occur should be exceedingly few if the law relating to public interest immunity is properly applied. The more important the information is to the just determination of a claim the greater the public interest in withholding it must be. Accordingly the cases in 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 gives great weight (as it should do)

to the achievement of justice.

87. In any event, justice is not merely a matter of achieving a "correct" outcome. A just result is one which is achieved by a process which is fair to all parties on the basis of admissible evidence. The fact that there may be inadmissible evidence which might cause the result to be different (for example information which is protected by legal professional privilege) does not render the process unjust: see per Lord Wilberforce ***Air Canada v the Secretary of State for Trade*** [1983] AC 394 at p438g (quoted in paragraph [76] above). Nor is a "correct" outcome better promoted by diluting the requirements of natural justice. As Lord Steyn has said[73],

> "Due process enhances the possibility of arriving at a just decision. Where due process cannot be observed it places in jeopardy the substantive justice the outcome."

A "closed material" procedure is not fair to all parties. It destroys equality of arms between the parties and puts them on an unequal footing. Inevitably the State and its agents are better placed to contest any case in which they are a party. Whilst the appointment of a special advocate may mitigate to a degree the disparity thereby inevitably created, it cannot put all parties back on an equal footing. This is not simply because a special advocate cannot discuss or obtain instructions on any "closed material" from the party he is charged with representing, although this is normally a "grave disadvantage" (as the House of Lords has recognised). It is also because, unlike a party, a special advocate does not have the resources that a party may have to investigate and challenge another party's case[74]. Nor does such an appointment make it any less unjust to deprive a party of the opportunity to know the case against him, to challenge it himself, to know what the judge may take into account against him and to know the judge's reasons for any decision adverse to him.

88. Observance of the rule of law also requires public confidence that criminal charges and civil claims are determined in accordance with a fair process by a judiciary which is independent and impartial.

(1) It is thus in the public interest that the administration of justice does not involve procedures which are incompatible with a reasonable person's conception of a

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73 ***Metcalf v Mardell*** [2002] UKHL 27, [2003] 1 AC 120, at [42].

74 See the observations of Sullivan J on the limited functions of special advocates in control order proceedings in ***Re MB*** [2006] EWHC 1000 (Admin) at [98].

fair process, particularly in cases in which the State or its agents are a party. No reasonable person would consider that he had had a fair hearing (for example) if he was kept in ignorance of the case against him, if he was denied the opportunity to challenge it himself and if he was denied the reasons for any decision adverse to him. A "closed material" procedure will inevitably leave any reasonable party who is unsuccessful with a sense of injustice.

(2) Moreover such a procedure is one that renders the independence and impartiality of the judiciary and the quality of their judgments within the "closed material" procedure inscrutable to the parties and to the public. Occasions on which there is no such transparency should be minimised if public confidence in the judiciary, and thus in the administration of justice, is to be maintained and the scope for abuse minimised. A general power to order a "closed material" procedure will multiply those occasions. The abandonment of the law relating to public interest immunity will inevitably mean that, in all cases in which there is likely to be some harm to the public interest by the disclosure of information, the court will adopt a "closed material" procedure precisely because the issue will not be whether the public interest on balance requires the information to be disclosed. Justice needs to be done but it also needs to be seen to be done. A "closed material" procedure inevitably means it will not be.

89. The law on public interest immunity has been extensively considered and reviewed many times in the past four decades, either directly or in the course of a broader inquiry, including (i) the Royal Commission on Criminal Procedure (1981 Chairman Sir Cyril Philips)[75]; (ii) the Report of the Royal Commission on Criminal Justice (1993 Chairman Viscount Runciman)[76]; (iii) the Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (1996 Scott VC)[77]; (iv) the Review of the Criminal Courts of England and Wales (2001 Auld LJ); (v) the Review of criminal investigations and prosecutions conducted by HM Customs and Excise (July 2003 Butterfield J); (vi) the Report of the Privy Councillor Review Committee Review of the Anti-Terrorism Crime and Security Act 2001 (2003

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[75] Cm 8092.

[76] Cm 2263.

[77] HC 115.

Chairman Lord Newton of Braintree)[78]; (vii) the Law Commission, In the Public Interest: Publication of local authority inquiry reports (2004)[79]; (viii) House of Commons Constitutional Affairs Committee, The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates (2005)[80]; (ix) Lord Coulsfield, Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland (2007); and (x) the Report of the Privy Council Review of Intercept as Evidence (2008 Chairman Sir John Chilcot)[81]. No inquiry, whether judicial, parliamentary or governmental, has ever come close to suggesting that material withheld on public interest immunity grounds could nonetheless be used as evidence or that a "closed material" procedure may sometimes be necessary.

(d) conclusion on whether there is a problem to which a "closed material" procedure is a solution

90. The arguments put forward by the Respondents for in effect abandoning the law relating to public interest immunity and diminishing the rights of parties to civil claims are contrary to the public interest. A radical change in the law, such as is necessarily involved in the Respondents' case, in order to give the court a power to order a "closed material" procedure is a matter for legislation.

THE AUTHORITIES SAID TO ESTABLISH THE POWER TO ORDER A "CLOSED MATERIAL" PROCEDURE

91. Silber J considered that there was "clear authority" that the court had power to order a "closed material" procedure on the basis of seven cases. None of these cases binds this Court to find that the court has such a power in determining a civil claim in the absence of specific legislation authorising it to do so.

(a) Home Secretary v Rehman

92. The first of these cases was ***Home Secretary v Rehman***[82]. This case involved an appeal from

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78 HC 100.

79 Cm 6274.

80 HC 323.

81 Cm 7324.

82 [2001] UKHL, [2003] 1 AC 153.

a decision of the Special Immigration Appeals Commission on whether the deportation of the applicant was conducive to the public good in the interests of national security. The Special Immigration Appeals Commission Act 1997 expressly provided for a 'closed material' procedure before the Commission. Section 7 of that Act gave any party the right to bring an appeal "on any question of law" material to the Commission's determination to the Court of Appeal. In the Court of Appeal Lord Woolf indicated that, had it been necessary in order to determine the appeal (which it was not in that case), the Court of Appeal could have appointed a special advocate: see at [31]-[32].

93. These observations are *obiter dicta* and it is unclear whether the issue was the subject of any dispute. However the observations can be supported in relation to that case. Section 15(3) of the Senior Courts Act 1981 gives the civil division of the Court of Appeal "all the authority and jurisdiction of the court or tribunal from which the appeal was brought" "for all purposes of or incidental to...the hearing and determination of any appeal". Just as SIAC had authority to conduct a "closed material" procedure when determining a case, so equally, therefore, had the Court of Appeal. In any event, when conferring a right of appeal from a tribunal that it had required to adopt a "closed material" procedure, Parliament cannot have intended that the exercise of that right of appeal would cause the information which it had required not to be disclosed in that tribunal to be disclosed in the Court of Appeal. Thus the Court of Appeal had a statutory power in determining appeals under the 1997 Act to adopt a "closed material" procedure.

94. But in any event the *obiter dicta* of Lord Woolf in a case which did not involve consideration of the power of the High Court to order a "closed material" procedure when determining a civil claim made to it cannot bind this Court to find that there is such a power in such a case.

(b) R v Shayler [2002] UKHL 11, [2003] 1 AC 247

95. The second case relied on by Silber J was ***R v Shayler***. This case involved an appeal from a ruling during a preparatory hearing in a criminal prosecution. Mr Shayler was charged with disclosing documents or information without lawful authority. The relevant statute provided that disclosure was made with lawful authority if, but only if, it was made to a Crown servant

for the purpose of his functions as such or in accordance with an official authorisation[83]. Mr Shayler was charged with disclosing material to a national newspaper. His defence was not that he had an official authorisation but rather that his disclosures were necessary in the public interest to avert damage to life or limb or serious damage to property. The trial judge ruled that was not a defence under the 1989 Act. Mr Shayler's appeals against that ruling were dismissed.

96. One of his contentions was that the statutory provisions (which were unambiguous) were incompatible with his right to freedom of expression. The House of Lords held that they were not. The procedure for obtaining official authorisation was a proportionate response and judicial review of any decision would be available.

97. The problem in such a case (which did not in fact arise in that case as Mr Shayler had made no request for such an authorisation) was not that Mr Shayler would not know what the information was that he wanted to disclose or that the public could not be excluded from any hearing in court if he was refused it. Mr Shayler's apparent complaint was that a lawyer of his own choosing might not be authorised to be told what the relevant material was. Lord Hope thought that article 6 of the Convention would enable him to secure authorisation for disclosure to such a lawyer[84]. Lord Hutton thought that it would not be appropriate to specify how the problem identified might be solved, although he thought that an application for authorisation relying on Convention rights might be appropriate or that the appointment of a special advocate to represent the member of the security service might be possible as suggested in *Rehman*[85]. Lord Bingham thought (like Lord Hope) that such a person could apply for authorisation to disclose material to a lawyer and that he could not "envisage circumstances in which it would be proper for the service to refuse its authorisation for any disclosure at all to a qualified lawyer from whom the former member wished to seek advice" but that, if the court had to consider material which could not be disclosed to the lawyer, it could appoint a special advocate as envisaged in *Rehman*[86]. Lord Hobhouse agreed with Lord Bingham[87] and Lord Scott agreed with the three reasoned speeches.

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83 See section 7 of Official Secrets Act 1989 and per Lord Bingham at [13], [2003] 1 AC 247.

84 See at [72]-[74].

85 See at [108] to [115]

86 See at [34].

87 See at [119].

98. It is important to note that this was not a case in which the Court had to decide whether, on any claim for judicial review of any refusal of authorisation, the High Court could adopt a "closed material" procedure *excluding a party*. This was not simply because there had been no such claim in that case. It was because the apparent issue in it did not concern Mr Shayler's exclusion from the hearing of any claim he might have made for judicial review. It concerned the possible exclusion of a *lawyer* of his choosing. Even if it was possible to treat the tentative consideration in the speeches in this case of what a court might do in such a case on a claim for judicial review as being part of the *ratio* of the decision (which it is not), it is not an authority that the court may adopt a "closed material" procedure excluding a *party* in a civil claim.

(c) R v H [2004] UKHL 3, [2004] 2 AC 134

99. The third case on which Silber J relied, ***R v H***, also arose at a preparatory hearing in a criminal prosecution. The issue which the House of Lords considered concerned how claims for public interest immunity should be dealt with in criminal trials and what article 6 of the ECHR may require when such claims are dealt with[88]. There is no doubt that the court *may* determine claims for public interest immunity in the absence of a party, including the accused and his legal representatives. Indeed the contention that a judge could not do so was not pursued in the House of Lords[89]. The issue was whether (and, if so, when) a criminal court had power to appoint a special advocate when considering claims to public interest immunity in their absence. The House of Lords recognised that in certain exceptional cases such an appointment might be made: see per Lord Bingham at [36]. In that case the House of Lords found that the judge had erred in appointing such an advocate.

100. This case does not address the question whether the court has a power to adopt a "closed material" procedure when determining the merits of a case, whether criminal or civil. It is not a case, therefore, which requires this Court to hold that there is such a power in a civil case. On the contrary the proper application of Lord Bingham's tests in relation to public interest immunity set out in paragraph [36] are clearly inconsistent with that occurring in a criminal case.

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88 See per Lord Bingham at [2].

89 See at [7].

(d) R (Roberts) v the Parole Board [2005] UKHL 45, [2005] 2 AC 738

101. The fourth case relied on by Silber J was ***R (Roberts) v the Parole Board***. In this case the Parole Board decided that evidence on which the Home Secretary intended to rely should be heard in the absence of, and not disclosed to, the claimant or his legal representatives as doing so would put an informant at risk. Instead they directed that the evidence should be disclosed only to a special advocate to be appointed on his behalf.

102. Under the Parole Board Rules 2004 any part of any information or report which otherwise had to be served on a prisoner and his representatives was to be withheld from the prisoner when it was proportionate to do if in the opinion of the Secretary of State its disclosure would adversely affect *inter alia* the prevention of disorder or the health or welfare of others and, where it was withheld from the prisoner, the chair of the panel had power to direct that it should be withheld from his representatives: see rules 6(2) and (3)[90]. Where the chair had dismissed any appeal by a prisoner against the withholding from him of any information or document, the chair of the panel had power to require the prisoner and anyone else present to leave the hearing when the evidence was being examined: see rules 8 and 19(6)[91].

103. There were thus statutory rules which empowered material to be kept "closed" from the prisoner and his representatives. It is important to note, as Lord Rodger emphasised, that Mr Roberts did not challenge the vires of these rules: see [106] and [111]. Accordingly the issue of whether, absent any specific statutory provision, a tribunal could adopt a "closed material" procedure did not arise for determination in this case.

104. The issues raised were (i) whether giving effect to these rules was incompatible with a prisoner's rights under article 5 of the ECHR and (ii) whether the Parole Board had power to appoint a special advocate. The House of Lords unanimously held that it was premature to determine the first of these issues: see the first holding[92]. The second issue might have been

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90 See at [22].

91 At [22].

92 It may be noted, as the Grand Chamber of the ECtHR has recently stated, that "it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation.": see eg ***A v the United Kingdom*** (2009) Feb 19th App No 3455/05 at [203].

thought straightforward given the rules mentioned above. The Board had power (under paragraph 1(2)(b) of Schedule 5 to the Crime Sentences Act 1997 to do anything incidental or conducive to the discharge of its functions[93]. Appointing a special advocate to mitigate the adverse effect of any such closed procedure would be an exercise of that power (as the majority found): see the second holding.

105. Accordingly this case also provides no basis on which this Court is bound to hold that the court may determine a civil claim on its merits using such a procedure in the absence of a specific enactment authorising it to do so.

(e) Shiv Malik v Manchester Crown Court [2008] EWHC 1362 (Admin), [2008] 4 All ER 403

106. The fifth case on which Silber J relied was ***Shiv Malik v Manchester Crown Court***. This was a claim for judicial review of a decision of the Crown Court to make an order under Schedule 5 of the Terrorism Act 2000 on the application of the Chief Constable of the Manchester Police requiring the claimant to produce certain documents. The claimant and his representatives were excluded from part of the hearing. One of the complaints made was that the hearing was unfair and in breach of his rights under article 6 as no special advocate was appointed to represent him: see [7], [30] and [94] and [95]. The issue was whether the Crown Court judge had erred in not asking for a special advocate. It was found that he had not.

107. There does not appear to have been any argument advanced that the Crown Court had no power to order a "closed material" procedure in the absence of any enactment enabling it to do so. Certainly there is no discussion of the issue in the judgment. However, in describing the background, the Court referred to *Rehman*, *Shayler*, *Roberts*, and *R v H* "in the context of an ordinary criminal trial"as being "cases where, without an applicable statutory scheme, the court has asked the Attorney-General for a special advocate": see [96]. In fact in none of those cases had any court asked the Attorney General for a special advocate to be appointed when determining a criminal prosecution or civil case on the merits; *Rehman* and *Roberts* were in any event both cases in which there was a statutory scheme enabling "closed material" hearings to be held; *R v H* was a case involving a public interest immunity application, not an ordinary criminal trial; and *Shayler* did not contemplate the case where a party was himself excluded.

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[93] See at [20].

It may also be observed that the judgment contains no analysis of the powers of the Crown Court in the absence of any enactment nor reference to the "principle of legality" and the authorities referred to above. Indeed it can scarcely be supposed that the Divisional Court intended to give any endorsement in this case to the notion that an ordinary criminal trial could involve a "closed material" procedure, something patently inconsistent with the decision in *R v H* and something which would be abhorrent to the conception of an English criminal trial quite apart from article 6 of the ECHR[94].

108. The decision of the Divisional Court is not one which in any event this Court is bound to follow nor does it contain a decision on the issue whether a court has power to use a "closed material" procedure in determining a civil claim on its merits in the absence of specific legislation authorising it to do so. With respect such reasoning as there is on that issue is unpersuasive.

(f) A and others v HM Treasury [2008] EWCA Civ 1187, [2009] 3 WLR 25 CA; [2010] UKSC 2

109. Silber J also relied on the decision in the Court of Appeal in ***A and others v HM Treasury*** on the claim for judicial review that two orders in council purportedly made under the United Nations Act 1946 freezing the financial assets and economic resources of a number of named individuals or those who were designated by HM Treasury were *ultra vires*. The Court of Appeal (Sir Anthony Clarke MR, Wilson LJ; Sedley LJ dissenting) held that they were *intra vires*.

110. The majority of the Court of Appeal took the view that there was a power to appoint a special advocate (but did not address the issue of whether the Court had a power to order a "closed material" procedure when determining any claim under one Order to set aside a designation apparently simply assuming it did): see at [58], [60], [73]-[78].

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[94] the court's reference in [100] to the fact that entitlement to disclosure of relevant evidence is not an absolute right under article 6 needs care: the EctHR requires that the accused should himself have an opportunity to challenge effectively the evidence relied on by the prosecution against him; it does not necessarily require evidence on which the prosecution is not relying to be disclosed. The distinction is itself clear in case of ***Botmeh and Alami*** (2007) June 7th App No 18187/03 at [36]-[45].

111. The Supreme Court has now held that the orders were *ultra vires*: [2010] UKSC 2. Whatever the merits of the views expressed in the Court of Appeal, they cannot bind this court to find that the court does have a power to order a "closed material" procedure when determining a civil claim given the decision of the Supreme Court.

112. The Court may wish to note that provision for such a procedure has been provided in such cases under the Terrorism Act 2008, as mentioned above.

(g) AHK and others v the Home Secretary [2009] EWCA Civ 287, [2009] 1 WLR 2049

113. This case involved claims for judicial review of decisions refusing the claimants British citizenship on the ground that they had failed to demonstrate good character. The Secretary of State considered that certain information should not be disclosed in the proceedings given the public interest in withholding it. The issue in this case, as formulated by the court, was "in what (if any) circumstances the judge could consider the documents before deciding whether or not to invite the Attorney General to appoint a special advocate"[95].

114. As the court said, "although the skeleton arguments range far and wide, as we read them the essential point which divided the parties in them was the insistence of the Secretary of State that the court should not appoint a special advocate until it had first considered the closed material and decided that there was no alternative", although that was modified during the hearing so that the Secretary of State's contention was that one should only be appointed when it was necessary to do so[96]. The claimants were pressing for a special advocate to be appointed in all or almost all of the cases when a judge was considering such material in their absence[97]. The court described the circumstances in which in its view a court should appoint a special advocate in [37] of its judgment.

115. The difficulty in this case lies in determining what the Court may have thought that the special advocate was to assist the judge to do (if appointed) or what the judge would otherwise do without his assistance. If the task in question was to determine whether public interest immunity attached to any information or proposed evidence and what could be disclosed (as

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95 See [1].

96 See at [15] and [16].

97 See at [15].

set out in [14]), the decision is of no assistance to the determination of the issue in this case whether the court has power to order a "closed material" procedure to be used in determining a civil claim on the merits.

116. If, on the other hand, the task was to appraise the information to be withheld as a result of the court determining that public interest immunity attached when determining the claim on the merits, not merely was the point evidently not raised that the court had no power to do so but the decision is *per incuriam*. The authorities show (as the Respondents in this case accept) that the consequence of public interest immunity attaching to any evidence is that it is inadmissible. Such authorities were not cited to the Court in argument.

117. The claimants in that case may or may not have faced greater difficulties in showing that no reasonable Secretary of State could have refused to be persuaded that they were of good character if information was withheld as a result of public interest immunity. The Secretary of State may or may not have found it easier to defend his decisions if such information had been available. But that is irrelevant.

(h) conclusion on the authorities said to establish that the court has a power to order a "closed material" procedure

118. None of the cases on which Silber J relied binds this Court to find that a court has power to order a "closed material" procedure when determining a civil claim on its merits in the absence of an enactment enabling it to do so. However certain features are notable about these cases: (i) the earliest suggestion that the court had any such power was only made *obiter* in the Court of Appeal by Lord Woolf in *Rehman* in April 2000; (ii) it was not the result of any comprehensive analysis of the law or the source of the court's power to make such an order; and (iii) such *dicta* have been repeated in a number of cases again without any such analysis, often treating the issue merely as being whether the court may appoint a special advocate (which it is not). It would be wrong on the basis of such case law as there is to conclude as Silber J apparently did that such a procedure is now "a firmly established principle of our legal system"[98]. The law relating to public interest immunity and the substantive rights of parties to civil claims should not be modified, even if the courts had power to do so, on such a basis.

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[98] See at [88].

CONCLUSION

119. The Court is respectfully invited to allow these appeals and answer the preliminary question in the negative as:

(1) the court has no power to adopt a "closed material" procedure in the absence of a specific statutory power authorising it to do so;

(2) the Civil Procedure Rules cannot, and do not, confer such a power in the case of a civil claim for damages and the inherent power of the court does not enable the court to adopt such a procedure;

(3) there is no authority which requires this court to hold otherwise;

(4) insofar as the ordinary manner of dealing with claims for public interest immunity may lead to any practical problem in providing a party with a fair hearing (which is doubtful), the law has recognised other means of dealing with such issues when appropriate to do so: the introduction of a "closed material" procedure would require legislation; and

(5) even if the court had power to provide for a "closed material" procedure, it would be self defeating and pointless if the court complies with its duty to apply the law on public interest immunity.

John Howell QC
Thursday, 25 February 2010

Jessica Boyd
Blackstone Chambers

CA ref: T3/2009/2581, 2584, 2680, 2681, 2682

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN: [2009] EWHC 2959 (QB)

BISHER AL RAWI AND OTHERS

Appellant / Claimants

and

THE SECURITY SERVICE AND OTHERS

Respondent / Defendants

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