Neutral Citation Number: [2020] EWHC 1695 (Admin)

Case No: CO/3952/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2020

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
AND
THE HONOURABLE MRS JUSTICE FARBEY

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) REPRIEVE
(2) RT HON DAVID DAVIS MP
(3) DAN JARVIS MBE MP **Claimants**

- and -

THE PRIME MINISTER **Defendant**

Mr Ben Jaffey QC and **Ms Natasha Simonsen** by video (instructed by **Birnberg Peirce**) for the Claimants
Sir James Eadie QC, Mr Ben Watson and **Mr James Stansfeld** by video (instructed by **Government Legal Department**) for the Defendant
Special Advocates: Mr Angus McCullough QC and **Mr Tim Buley QC** (instructed by the **Special Advocates' Support Office**) appeared by video but made written submissions only

Hearing date: 9 June 2020

Approved Judgment

The Court directs that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 30 June 2020.

Dame Victoria Sharp P.:

1. This is the judgment of the court to which both members have contributed. The claimants have applied for judicial review of the defendant's decision announced on 18 July 2019 that it was not necessary to establish a public inquiry to investigate allegations of involvement of the United Kingdom intelligence services in torture, mistreatment and rendition of detainees in the aftermath of events on 11 September 2001. In resisting the claim, the defendant has provided the court and the claimants with witness statements from two officials together with supporting documents. This evidence will be considered in open court. The defendant also seeks to rely on sensitive material and to withhold that material from the claimants and their legal representatives. In relation to the sensitive material, the interests of the claimants would be represented by special advocates in closed court sessions.

2. At a preliminary hearing, we heard submissions on (i) whether article 6(1) of European Convention on Human Rights ("the Convention") applies to these proceedings and (ii) if so, whether the claimants are entitled to disclosure to the extent set out in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

Factual background

3. For present purposes, the facts need only be summarised. On 6 July 2010, the then Prime Minister, Rt Hon David Cameron MP, announced that an independent inquiry, to be chaired by Sir Peter Gibson, would be established to investigate the alleged involvement of the United Kingdom intelligence services in the rendition and mistreatment of detainees held by foreign security services. The Prime Minister stated that the inquiry would not be a full public inquiry, as some information would have to remain secret, but that it would be able to consider all relevant information. The Gibson Inquiry subsequently began work on what is described as a "preparatory phase."

4. On 12 January 2012, the Metropolitan Police Service announced that it intended to investigate allegations of criminal wrongdoing in relation to the alleged rendition and ill-treatment of two Libyan nationals (Sami al-Saadi and Abdel Hakim Belhaj). On 18 January 2012, the then Lord Chancellor and Secretary of State for Justice, Kenneth Clarke MP, announced that, although the Gibson Inquiry had conducted preparatory work, it would not be in a position to start formally until the police investigations had been concluded. Kenneth Clarke stated that the Government intended to hold "an independent, judge-led inquiry" after the conclusion of the police investigations. The inquiry would "establish the full facts and draw a line under these issues."

5. In December 2013, Sir Peter Gibson's report on his inquiry's preparatory work was published. On 13 December 2013, Kenneth Clarke, then the Minister without Portfolio, told the House of Commons that it would be wrong for a judge to hold an inquiry into material which the police were still investigating. He had, however, invited the Intelligence and Security Committee of Parliament ("the ISC") to inquire into the issues raised by the Gibson Report. He stated that, after the conclusion of the ISC inquiry and the police investigations, it would be possible "for the Government to take a final view as to whether a further judicial inquiry still remains necessary to add any further information of value to future policy-making and the national interest."

6. On 28 June 2018, the ISC published two reports: "Detainee Mistreatment and Rendition: 2001-2010" and "Detainee Mistreatment and Rendition: Current Issues". On 22 November 2018, the Government published its response to the reports. On 18 July 2019, the Minister for the Cabinet Office, David Lidington MP, announced the Government's decision not to hold a public inquiry into detainee issues because various statutory and non-statutory steps - which had by then been taken - had led to improved policies and practices.

Procedural history

7. On 9 October 2019, the claimants launched judicial review proceedings on two grounds. First, the claimants emphasise that the prohibition of torture, inhuman and degrading treatment or punishment in article 3 of the Convention imposes a positive obligation on States to conduct an effective independent investigation into allegations of ill-treatment (as elucidated in cases such as *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 E.H.R.R. 25). The claimants submit that the article 3 investigative obligation arises in this case. The defendant's decision not to hold a public inquiry breaches the obligation. Secondly, it is submitted that the decision is irrational because (in summary) the various steps taken by the Government were not a sufficient reason for abandoning the previous decision that a public inquiry was necessary. The claimants seek (among other items of relief) an order quashing the decision not to hold an independent, judge-led inquiry.

8. The defendant resists the claim on the grounds that there is no need for a public inquiry because there is no unmet investigative obligation of the sort envisaged in *El-Masri* or otherwise. The relevant issues have already been properly considered in other reviews and reports. A public inquiry would be disproportionately costly in light of the lessons already learned and the significantly changed landscape in which the relevant issues would be addressed. The decision under challenge is reasonable and cannot be impugned on public law grounds. In opposing the claim, the defendant seeks to rely on "sensitive material" within the meaning of section 6(11) of the Justice and Security Act 2013, namely "material the disclosure of which would be damaging to the interests of national security."

9. Permission to apply for judicial review was granted by Hilliard J on 25 November 2019. Given that he relies on sensitive material, the defendant applied for a declaration that these are proceedings in which an application for a closed material procedure could be made under section 6(1) of the 2013 Act. In support of a declaration, the Home Secretary provided a witness statement to the effect that the closed material could not be disclosed to the claimants because the interests of national security would be damaged.

10. On 19 March 2020, Garnham J approved a consent order which made the section 6 declaration and gave case management directions in relation to all steps up to and including the substantive hearing for judicial review. By that time, special advocates (Mr Angus McCullough QC and Mr Tim Buley QC) had been appointed under CPR 82.9. Garnham J set a timetable for the Special Advocates to consider the closed material and for the court to rule on any challenge to keeping the material closed.

11. On 21 April 2020, the directions were varied by consent owing to the exigencies of the Covid-19 pandemic. The closed element of the proceedings was stayed pending resolution of the issues before us. We heard argument in open session only.

Legal framework

The scope of article 6(1)

12. Article 6 of the Convention enshrines the right to a fair trial. It is an absolute right. It has both a civil and a criminal aspect. The claimants do not submit that these proceedings are akin to criminal proceedings. In relation to civil proceedings, article 6(1) stipulates (among other things) that "in the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing…"

13. The concept of "civil rights and obligations" cannot be interpreted solely by reference to national law but has an autonomous meaning within article 6(1) (*QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin), para 34; citing *Ferrazzini v Italy* (2002) 34 E.H.R.R. 45, para 24). It is now well-established that some rights classified domestically as public law rights may be classified as civil rights under the Convention. Procedures classified domestically as relating to public law can come within the civil aspect of article 6(1) if "the outcome was decisive for private rights and obligations" (*Ferrazzini*, para 27).

14. Both the European Court of Human Rights and the domestic courts have nevertheless made clear that claims made in public law proceedings cannot simply be elided with "civil rights" under article 6(1). Administrative and executive decisions may involve the "hard core of public-authority prerogatives" which do not engage article 6 (*Ferrazzini*, para 29). For example, immigration decisions (concerning the stay and expulsion of non-nationals) do not entail any determination of civil rights. The effect of an expulsion decision on an individual's civil rights (such as his family life) is incidental to the exercise of administrative powers exercised by the State for the purpose of immigration control (*Maaouia v France* (2001) 33 E.H.R.R. 42).

15. The importance of the individual rights that stand to be incidentally affected cannot convert public law proceedings into civil proceedings. Returning to the example of immigration law, it is a ground of appeal against deportation that a person would be put at risk of torture or other ill-treatment in his country of origin, contrary to the absolute prohibitions of article 3 of the Convention. However, the nature of the risk to the individual, and the importance of the prohibition against torture in domestic and international law, do not mean that article 6(1) applies. Those who face deportation are not able to invoke procedural protections by reference to article 6(1) but may rely on principles of fair trial in public law. The criterion for determining whether article 6 is engaged is "the nature of the proceedings and not the articles of the Convention which are alleged to be violated" (*RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, para 175).

16. We were not directed to any authority which provides a comprehensive definition of "civil rights" under article 6(1). In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 79, Lord Hoffmann referred to "rights in private law." Decisions taken by administrative authorities which are decisive of the enforceability of private law

contracts would fall into this category (*Alconbury*, para 80; citing *Ringeisen v Austria (No 1)* (1971) 1 E.H.R.R. 455). Other examples include individual claims for compensation, including claims in respect of ill-treatment by agents of the State (*Aksoy v Turkey* (1997) 23 E.H.R.R. 553, para 92). There are indications in the case law that any human right protected by the Human Rights Act 1998 will be a "civil right" in so far as breach of the right would constitute a statutory tort (see *QX*, paras 42-44, and the cases cited there).

17. On behalf of the defendant, Sir James Eadie QC (together with Mr Ben Watson and Mr James Stansfeld) submitted that "civil rights" must be rights that inhere in a particular individual as opposed to reflecting the public interest more generally. We do not need to decide whether that formulation is definitive; but it is in our judgment consistent with the case law cited above.

18. Article 6(1) will not be engaged in procedures that do not "determine" civil rights and obligations in the sense of adjudicating upon and making a dispositive legal determination of rights (*QX*, para 45; citing *Fayed v United Kingdom* 18 E.H.R.R. 393, para 61). The result of the proceedings must be "directly decisive" of a civil right or obligation (*Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 E.H.R.R. 1, para 47).

The effect of *AF (No 3)*

19. In *AF (No 3)*, the issue before the House of Lords was whether the closed material procedure in proceedings challenging control orders (made under the Prevention of Terrorism Act 2005) was compatible with article 6. In reaching its conclusions, the court applied the decision in *A v United Kingdom* (2009) 49 E.H.R.R. 625 in which the Grand Chamber of the European Court of Human Rights had considered a similar procedure in reviews of orders made under the Anti-terrorism, Crime and Security Act 2001. That Act permitted the Secretary of State to order the detention of terror suspects with a view to deportation.

20. Given the context of detention, the Grand Chamber was concerned with the right to liberty under article 5 of the Convention and with the fairness of a closed material procedure under article 5(4). The Grand Chamber referred to "the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights." In those circumstances, article 5(4) imported "substantially the same fair trial guarantees as article 6(1) in its criminal aspect" (para 217).

21. It was against the background of the standard of fair trial guarantees imported by article 5(4) and article 6(1) in its criminal aspect that Lord Phillips gave the leading judgment in *AF (No 3)*. He observed at para 57:

> "Mr Eadie submitted that a less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg court would draw any such distinction when dealing with the

> minimum of disclosure necessary for a fair trial. Were this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases."

22. Applying the reasoning of the Grand Chamber, he held at para 59:

> "Contrary to Mr Eadie's submission, I am satisfied that the essence of the Grand Chamber's decision lies in para 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

23. It follows that, where executive action is taken against an individual in a manner which affects his liberty, the case made against him cannot turn solely or decisively on closed material.

24. The courts have been willing to extend the cases in which *AF (No 3)* disclosure must be given from detention cases to (among other things) asset freezing orders; directions to banks relating to financial restrictions pursuant to the Counter-Terrorism Act 2008; and orders made under the Terrorism Prevention and Investigation Measures ("TPIM") Act 2011 (see the summary of the case law in *Bank Mellat v Her Majesty's Treasury (No 4)*, [2015] EWCA Civ 1052, [2016] 1 WLR 1187, para 22). In each case, the challenge related to executive action brought against an individual or organisation. The measures were "highly restrictive…with very serious effects" (*Bank Mellat*, para 23). These careful extensions, undertaken on a case-by-case basis, reflect the importance both of fair trial rights and of the interests of national security. They extend but are consistent with the reasoning in *AF (No 3)* which was (as we have set out above) rooted in the liberty of the individual and fair trial procedures under article 5(4).

25. In cases that do not involve executive action against the individual, the courts have held that a fair trial may take place without full *AF (No 3)* disclosure. In *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, the claimant's security clearance had been removed and he had been suspended from his employment on grounds of national security. The issue was whether the fundamental nature of equality rights meant that he was entitled to *AF (No 3)* disclosure, in order to advance his claims to have suffered discrimination on grounds of race and religion. Giving the leading judgment, Lord Mance JSC distinguished (at para 27) those cases involving liberty from others:

> "… the reasoning in para 217 of the European Court of Human Rights' judgment in *A v United Kingdom* emphasises the

> context of that decision, the liberty of the individual. Detention, control orders and freezing orders impinge directly on personal freedom and liberty in a way to which Mr Tariq cannot be said to be exposed. In *R (AHK) v Secretary of State for the Home Department (Practice Note)* [2009] 1 WLR 2049, a claim for judicial review of the refusal of an application for British citizenship, the Court of Appeal distinguished *A v United Kingdom* on the ground that it was focusing on detention. In my opinion, it was justified in making this distinction. An applicant for British citizenship has, of course, an important interest in the appropriate outcome of his or her application. Mr Tariq also has an important interest in not being discriminated against which is entitled to appropriate protection; and this is so although success in establishing discrimination would be measured in damages, rather than by way of restoration of his security clearance (now definitively withdrawn) or of his position as an immigration officer. But the balancing exercise called for in para 217 of the judgment in *A v United Kingdom* depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself. ”

26. Lord Hope of Craighead DPSC observed (at para 83) that there are “no hard edged rules in this area of the law…It must be a question of degree, balancing the considerations on one side against those on the other, as to how much weight is to be given to each of them.” Lord Dyson JSC, citing previous case law, distinguished between the absolute right to a fair trial and the constituent elements of a fair trial process, which are not absolute or fixed (paras 139-140). The general rule is that parties are entitled to “the full panoply of article 6 rights, including full disclosure of all relevant material.” Any limitations require “careful justification” (para 146). Nevertheless, in determining the scope of procedural rights, the courts are entitled to strike an appropriate balance between the rights of the individual and other competing interests (para 147).

27. A similar approach was taken in *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776, [2016] QB 595. Lord Dyson MR (with whom Richards LJ and Lewison LJ agreed) held that the requirements of article 6 “depend on context and all the circumstances of the case” (para 23). The court will strike an appropriate balance between the requirements of national security and the right of an individual to effective judicial protection. The balancing of these competing interests must take account of all the facts of the particular case (para 43).

28. In *R (AZ) v Secretary of State for the Home Department* [2017] EWCA Civ 35, [2017] 4 WLR 94, para 29, Burnett LJ referred to a “sliding scale for the purposes of disclosure.” In *K, A and B v Secretary of State for Defence* [2017] EWHC 830 (Admin), para 12, the Divisional Court referred to a “spectrum of cases and a spectrum of disclosure rather than a hierarchy.”

29. For present purposes, we do not think that the precise language matters. The key point is that the courts will take a contextual and fact-sensitive approach to the question of disclosure. We would agree too with Irwin J (as he then was) in *Kamoka v The Security Service* [2015] EWHC 3307 (QB), para 23, that the court should consider both the nature of the issue at stake and what is needed for the fair disposal of the litigation in hand.

30. Outside the context of the Convention, the essence of the grounds for excluding a European Union national from the United Kingdom must be disclosed by virtue of article 47 of the Charter of Fundamental Rights of the European Union (*ZZ (France) v Secretary of State for the Home Department* [2014] EWCA Civ 7, [2014] QB 820). Subsequent cases have held that the approach under EU law mirrors that of the Convention in that the extent of disclosure to which an individual is entitled in civil proceedings is context-based (*Kiani*, paras 39-42; *AZ*, para 29). We note that exclusion under EU law amounts to executive action against the individual in relation to freedom of movement rights and that, if an individual seeks to breach an exclusion order, the State is permitted to take coercive steps (for example, by detention under immigration powers).

The parties' submissions

31. On behalf of the claimants, Mr Ben Jaffey QC (with Ms Natasha Simonsen) submitted that article 6 of the Convention applies to these proceedings because they concern the fundamental right to freedom from torture and other ill-treatment prohibited by article 3 of the Convention. The court is being asked to determine the nature and scope of the claimants' right to a lawful decision in respect of the investigative obligation under article 3. As this right is protected under the Human Rights Act, it is an enforceable statutory right amounting to a "civil right" within the meaning of article 6(1).

32. Mr Jaffey submitted that the requirements of article 6(1) mean that the claimants are entitled to full *AF (No 3)* disclosure. The principles in *AF (No 3)* are of general application in cases concerning fundamental rights. The gravity of the issues, namely the adequacy of the Government's response to serious allegations that the United Kingdom intelligence services were involved in the ill-treatment of detainees and their rendition, should be tested in open proceedings, so that the claimants and the public may have confidence in the administration of justice.

33. Disclosure in accordance with *AF (No 3)* is necessary in order to ensure a fair hearing because the claimants, who have considerable expertise and sources of information, will be able to investigate and ascertain whether there is in fact no unmet investigative need, as the defendant maintains. The Special Advocates do not possess this expertise. Mr Jaffey relied on a Note from the Special Advocates in which they set out the constraints of their role and the limitations of their capacity to undertake factual investigations (for example, they cannot interview witnesses).

34. On behalf of the defendant, Sir James submitted that, while the question of whether article 6 applies to these proceedings is complex, and potentially fact-sensitive, the better view is that it does not apply. The issue in these judicial review proceedings is whether the defendant's refusal to hold a public inquiry was unlawful. That decision does not relate to the claimants' or any other individual's human rights but to wider

issues of public and political debate. The claimants cannot be said to have themselves been the subject of human rights violations; nor are any victims of human rights violations before the court in these proceedings. In the circumstances, it is difficult see how these proceedings relate to any individual's "civil rights."

35. Even if this court were able to take into consideration the putative interests of as yet unnamed and unknown persons, the judicial review proceedings would nevertheless not concern their civil rights. Any public inquiry would be a wide-ranging investigation and would not be a forum for the vindication of individual rights. There is no civil right to a public inquiry. These proceedings concern questions of public law rather than private rights.

36. Sir James submitted that, if article 6 does apply, the claimants are not entitled to *AF (No 3)* disclosure. The core purpose of *AF (No 3)* disclosure is to enable individuals to know the allegations against them which are being relied upon to support ongoing executive action which intrudes on fundamental rights. In this case, the court will not be concerned with executive action against any individual or with the restriction of any individual's fundamental rights.

37. Weighing the interests of national security against the claimants' interest in disclosure, it is important to bear in mind the court's function in judicial review proceedings. The court will apply legal principle to the evidence before the defendant in order to determine the lawfulness of the decision. The court will not act as a primary decision-maker and will not make findings of fact in relation to evidence supplied by the claimants, who will be able to give effective instructions to the Special Advocates on the legal issues.

Discussion

Article 6(1)

38. We start from two indisputable propositions. First, the right to a fair hearing is a cornerstone of the rule of law. Secondly, the function of the court in judicial review proceedings is to ensure the scrutiny of executive action in the public interest. Given the constitutional importance of both these propositions, the actions of the intelligence services are not immune from the gaze of this court.

39. We are sympathetic to Mr Jaffey's observation that the public are entitled to a high degree of confidence that, in relation to the treatment of detainees, the United Kingdom intelligence services do not operate beyond the reach of the law. Sir James (in our view very properly) accepted that Reprieve has particular expertise in the investigation of human rights abuses abroad. That said, our task is a narrow one, involving the application of established principles of human rights law as well as general public law.

40. As expressed in their skeleton argument, the claimants submit that article 6(1) applies because the court is being asked to determine "the nature and scope of the Claimants' right to a lawful decision in respect of the investigative obligation under Article 3 of the ECHR." However, the right to a lawful decision by the executive does not in itself give rise to a "civil right" within the meaning of article 6 (*Alconbury*, paras 79-80). The claimants have applied for judicial review on public law grounds. They

seek public law relief in reliance on the Human Rights Act. Breach of the Act constitutes a ground of public law unlawfulness in addition to the other, conventional grounds on which the court will interfere with executive decisions. While it is possible for such decisions to involve civil rights, they need not do so (*Ferrazzini*, para 29).

41. In these judicial review proceedings, the claimants contend that the decision not to hold a public inquiry breaches the defendant's duty to hold an effective investigation under article 3 of the Convention. We are willing to assume for present purposes that a breach of the State's article 3 investigative duty may in principle give rise to individual rights that may be classified as "civil rights" (for example, in claims brought by an individual for damages for breach of the duty). However, in any public inquiry, the claimants would not seek a determination of their own article 3 rights but would raise the rights of others who (on the claimants' case) may have been the subject of mistreatment. The claimants in our judgment cannot possibly be regarded as victims of article 3 violations. It follows that any duty to investigate article 3 breaches by way of a public inquiry is not a duty owed to the claimants as victims. In these circumstances, it is difficult to envisage how the present judicial review proceedings – which concern the investigative duty - have anything to do with the claimants' civil rights.

42. Mr Jaffey emphasised that the claimants had decided to apply for judicial review as the putative victims of article 3 breaches could not be expected to do so and are unaware of the challenge. If the claimants are unable to invoke the fair trial guarantees of article 6 on behalf of others, there is the risk that the judicial review proceedings will be unfair to victims.

43. As intelligently as this argument was put before us, the court is bound to operate within the legal parameters of the case before it and to deal with the claim which is presented to it. The claimants' standing to bring proceedings has not been the subject of dispute, but it does not follow that they may step into the shoes of third party victims.

44. We were not directed to any authority to suggest that a person may invoke procedural guarantees unless a party to the proceedings in question. In the circumstances of the present case, we see no reason to conclude that the scope of article 6(1) should extend to unknown persons who do not appear before the court. We do not rule out the possibility that a party might in some circumstances invoke article 6(1) on behalf of a person unconnected to the proceedings. We do not need to decide that broader question. We are clear that the claimants cannot do so in the present case. For these reasons, we conclude that article 6(1) is not engaged in these proceedings.

The application of *AF (No 3)*

45. Even if article 6 were to apply, we would not accept that *AF (No 3)* disclosure is required in this case. In our judgment, the analysis of control orders which underpinned the conclusions in *AF (No 3)* does not apply here. These judicial review proceedings do not involve the liberty of the individual in the sense that the proceedings are not concerned with granting release from detention. Nor does the refusal of a public inquiry raise anything akin to deprivation of liberty, unlike control orders. The question is whether we should extend *AF (No 3)* to this kind of case. In

answering this question, our task is to consider the context of the proceedings and to undertake a balancing exercise, taking into consideration the "nature and weight of the circumstances on each side" (*Tariq*, para 27).

46. Mr Jaffey relied on the nature of the issue at stake. An adequate investigation into allegations of ill-treatment is important for the rule of law. There is a high public interest in ensuring that the Government is properly held to account for any involvement in human rights abuses abroad. We accept that these are significant considerations. On the other side of the scales, we are bound to take into consideration that those cases to which *AF (No 3)* has been extended relate to highly restrictive, executive measures with very serious effects for individual rights. In this case, no executive action has been taken against the claimants. There are no allegations being made against them which they are compelled by force of circumstance to rebut in order to protect fundamental rights. It is the State which seeks to resist a claim brought by the claimants.

47. Mr Jaffey asked us to read *Secretary of State for the Home Department v Mohamed & CF* [2014] EWCA Civ 559, [2014] 1 WLR 4240 as casting doubt on the distinction between (on the one hand) cases in which an allegation is made by the State against an individual and (on the other hand) cases in which an individual makes a claim against the State. We do not agree with this reading. *Mohamed & CF* confirms (at para 16) that in control order and TPIM proceedings, which involve liberty, *AF (No 3)* applies both to the Secretary of State's case against the controlled person and to any positive case which the individual mounts against the imposition of the order or measures. That is a different and narrower proposition than Mr Jaffey advanced.

48. We turn to what is needed for the fair disposal of these proceedings. Mr Jaffey submitted that the claimants will be unable to meet the defendant's case that there is no unmet investigative need unless they know what has or has not been investigated. However, the defendant has provided two witness statements and supporting documents, so that the claimants know something of the defendant's case. This is not a case where there is nothing in the public domain about the issues which the claimants raise.

49. The claimants do not accept that they will be able to give effective instructions to the Special Advocates, and Mr Jaffey emphasised that the claimants each have expertise which the Special Advocates inevitably do not have. However, on conventional principles of judicial review, the court will not examine the merits of the defendant's decision but will consider whether the decision was lawful. The court will undertake this task on the evidence that was before the defendant and will not assume the role of primary fact-finder. We would be reluctant to see this claim develop into a vehicle for evidence-gathering which would be contrary to the essential purpose of judicial review. The expertise which the claimants have in the investigation of human rights violations will not determine the court's appraisal of the lawfulness of the decision under challenge.

50. The scope for giving instructions to the Special Advocates will be correspondingly more limited than in cases where the court is the primary decision-maker. We are not persuaded that the Special Advocates will be unable to deal with, or that the court will be unable fairly to decide, the questions of law in issue.

A middle way?

51. We heard argument on whether article 6(1) may require a certain standard of disclosure in cases where *AF (No 3)* does not apply. It might be said that the reference in para 12 of *K, A and B* to a spectrum of disclosure (in addition to a spectrum of cases) provides some support for a middle way in which article 6(1) would require some definite but lesser degree of disclosure than *AF (No 3)*. Without deciding the general point, we would not have been persuaded that (if article 6(1) applied here) there would be any feature of this case that would place it in some intermediate position.

The court's duty

52. Our conclusions do not mean that the Home Secretary's reasons for withholding the material will avoid independent scrutiny or that there is any lacuna in the rule of law. The court will "always be astute to examine critically any claim to withhold information on public interest grounds" (*Tariq*, para 161). The process by which the court considers whether the closed material has been justifiably withheld has not yet commenced. The Special Advocates will be able to probe the Home Secretary's reasons. The court will actively supervise the structured disclosure process which will now take place in accordance with Part 82 of the Civil Procedure Rules and the directions which we propose to give.

53. The court will decide whether the claimants should receive further disclosure of information or documents including further gisting of the defendant's case. It will keep the question of disclosure under review, reassessing when necessary the interests of the claimants against the force of the reasons for withholding the material. In this way, the court will be able to ensure the ingredients of a fair trial while upholding the strong public interest in national security.

54. We have asked Counsel to endeavour to agree directions for the disclosure process and for the future progress of the claim. There is no closed judgment.