HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 46

on appeal from:[2006] EWCA Civ 1140,

[2007] EWHC 651 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Respondent) *v.*
MB (FC) (Appellant)
Secretary of State for the Home Department (Respondent) *v.*
AF (FC) (Appellant) (Civil Appeal from Her Majesty's High Court of Justice)
Secretary of State for the Home Department (Appellant) *v.*
AF (FC) (Respondent) (Civil Appeal from Her Majesty's High Court of Justice)

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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Appellants:
MB: Tim Owen QC
Kate Markus
Ali Bajwa
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AF: Timothy Otty QC
Zubair Ahmad
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Respondents:
Ian Burnett QC
Philip Sales QC
Tim Eicke
Cecilia Ivimy
Andrew O'Connor
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Intervener
Justice:
Michael Fordham QC and Tom Hickman
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Special Advocates
Michael Supperstone QC and Judith Farbey
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5, 9, 10, 11, 12 and 13 July 2007

ON

WEDNESDAY 31 OCTOBER2007

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Respondent) *v.* MB (FC) (Appellant)
Secretary of State for the Home Department (Respondent) *v.* AF (FC) (Appellant) (Civil Appeal from Her Majesty's High Court of Justice)
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[2007] UKHL 46

LORD BINGHAM OF CORNHILL

My Lords,

1. By his appeal to the House, MB seeks to challenge a non-derogating control order made by the Secretary of State on 5 September 2005 under sections 2 and 3 (1)(a) of the Prevention of Terrorism Act 2005. That order was maintained in force by Sullivan J in a decision of 12 April 2006 ([2006] EWHC 1000 (Admin), [2006] HRLR 878, but he declared section 3 of the Act to be incompatible with MB's rights to a fair hearing under article 6(1) of the European Convention on Human Rights. On 1 August 2006 the Court of Appeal (Lord Phillips of Worth Matravers CJ, Sir Anthony Clarke MR and Sir Igor Judge P) allowed an appeal against the judge's decision and set aside his declaration of incompatibility : [2006] EWCA Civ 1140, [2007] QB 415.

2. AF was the subject of a non-derogating control order made by the Secretary of State on 11 September 2006 and varied on 18 October 2006. This order also was made under sections 2 and 3(1)(a) of the 2005 Act. Following a full hearing under section 3(10) of the Act, Ouseley J on 30 March 2007 quashed the order but dismissed an application by AF for a declaration of incompatibility: [2007] EWHC 651 (Admin). The judge granted a certificate permitting both parties to appeal directly to the House pursuant to section 12(3)(b) of the

Administration of Justice Act 1969, and the House granted leave on 17 May 2007.

3. In granting this certificate, Ouseley J identified four questions, which it is convenient to label issues (1) to (4) :

Issue (1): Whether the cumulative impact of the obligations imposed on AF by the control order dated 11 September 2006 and pursuant to the 2005 Act amounted to a deprivation of liberty within the meaning of article 5(1) of the European Convention.

Issue (2): If the answer to issue (1) is in the affirmative, in circumstances where the court is satisfied that the Secretary of State was entitled to conclude that there is a reasonable suspicion that AF is or has been involved in terrorist-related activity and that it was necessary to make a control order imposing obligations on AF for purposes connected with protecting members of the public from a risk of terrorism, whether it is a proper exercise of the discretion under section 3(12) of the 2005 Act or generally to order that a control order should be quashed as a whole and *ab initio* rather than to quash individual obligations and/or direct the Secretary of State to modify individual obligations

Issue (3): Whether a non-derogating control order imposed under the 2005 Act constitutes a criminal charge for the purposes of Article 6 of the European Convention.

Issue (4): Whether the procedures provided for by section 3 of the 2005 Act and the Rules of Court are compatible with article 6 of the Convention in circumstances where they have resulted in the case made against AF being in its essence entirely undisclosed to him and in no specific allegation of terrorism-related activity being contained in open material.

The judge decided issues (1) and (2) in favour of AF and adversely to the Secretary of State, who appeals against those rulings. He decided

issues (3) and (4) in favour of the Secretary of State and adversely to AF, who cross-appeals against those. In his separate appeal, MB complains that in relying heavily on material not disclosed to him to support the control order against him the Court of Appeal acted incompatibly with article 6 and so unlawfully. Thus, despite factual differences between their cases, MB supports the argument of AF on issue (4), as do JUSTICE and Liberty (although Liberty intervene only in the case of *Secretary of State for the Home Department v E and S* [2007] UKHL 47).

4. The terms of these issues, particularly issues (1) and (2), have direct reference to the terms of the 2005 Act. I would make reference to, and will not here repeat, the general summary of that Act which I have given in *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45.

Issue (1)

5. AF is a dual United Kingdom and Libyan national. He was born in this country on 1 July 1980. His father is Libyan, his mother British. The family moved to Libya during the 1980s, but his mother returned here, where she still lives. She is the landlady of a public house in West Yorkshire. AF spent his formative years in Libya with his father and sister. They left Libya in December 2004, according to AF because of a blood feud between his family and the Gadaffi tribe, and also to take advantage of better job opportunities. AF was briefly married, is now divorced and has no children. He has a fiancée in Libya. Since a date shortly after his arrival in the UK, AF has lived with his father in a flat rented from the council on the outskirts of Manchester. His sister lives in Paris with her husband and two children.

6. A control order was first made against AF on 24 May 2006. This, among other obligations, confined him to his flat for 18 hours each day. The Secretary of State revoked that order following the Court of Appeal decision in *JJ and others* and replaced it by the order made on 11 September 2006 of which complaint is now made.

7. By the 11 September control order AF was required to remain in the flat where he was already living (not including any communal area) at all times save for a period of 10 hours between 8 am and 6 pm. He was thus subject to a 14 hour curfew. He was required to wear an

electronic tag at all times. He was restricted during non-curfew hours to an area of about 9 square miles bounded by a number of identified main roads and bisected by one. He was to report to a monitoring company on first leaving his flat after a curfew period had ended and on his last return before the next curfew period began. His flat was liable to be searched by the police at any time. During curfew hours he was not allowed to permit any person to enter his flat except his father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor's name, address, date of birth and photographic identification. He was not to communicate directly or indirectly at any time with a certain specified individual (and, later, several specified individuals). He was only permitted to attend one specified mosque. He was not permitted to have any communications equipment of any kind. He was to surrender his passport. He was prohibited from visiting airports, sea ports or certain railway stations, and was subject to additional obligations pertaining to his financial arrangements.

8. In his judgement, Ouseley J summarised the evidence given by AF concerning the impact of the order upon him. He had three times been refused permission to visit his mother. His sister and her family were unwilling to visit because of the traumatic experience of one child when AF was first arrested. Friends were unwilling to visit. He only had one Libyan or Arabic-speaking friend in the area he was allowed to frequent, which was not the area to which he had gravitated before. He was not permitted to attend the mosque he had attended before, and was confined to an Urdu-speaking mosque; he could not speak Urdu. He could not visit his Arabic-speaking general practitioner. He could not continue his English studies, since there were no places at the college in his permitted area. He was cut off from the outside world (although, as was pointed out, he had television access to Al Jazeera). The judge very broadly accepted AF's account of the effects of the control order on him, and of his reaction to those effects (para 53 of his judgment), while noting certain elements of overstatement and exaggeration (paras 53, 54). The judge concluded that the effects of the control order as described by AF were the effects which the restrictions were intended to have (para 54).

9. The judge reviewed the Convention and domestic jurisprudence on deprivation of liberty, including the recent decisions of Sullivan J and the Court of Appeal in *JJ and others* ([2006] EWHC 1623 (Admin), [2006] EWCA Civ 1141, [2007] QB 446) and Beatson J in *E and S* ([2007] EWHC 233 (Admin), [2007] HRLR 472), I have myself attempted to summarise the effect of the Convention and domestic

jurisprudence in my opinion in *JJ and others* ([2007] UKHL 45, paras 12 to 19). I need not repeat that summary. Ouseley J analysed the effect of the jurisprudence in a careful and judicious manner.

10. The judge noted (para 76) that it is the cumulative effect of the restrictions which matters. Turning to the facts of the case, he treated the 14-hour curfew as the most important aspect (para 78). He regarded the case as finely balanced (*ibid.*), but was of opinion that once a curfew reaches, let alone exceeds, 12 hours a day, the scope for further restrictions on what can be done during those hours of curfew without depriving someone of their liberty is very substantially reduced. The judge reviewed certain of the other restrictions, and regarded the case (para 89) as "quite finely balanced". But having compared AF's situation with that of E, and noted in particular AF's longer curfew and geographical restriction, he concluded that the effect of the order was to deprive AF of his liberty, and that the order was accordingly a nullity (para 89).

11. Subject to one point, I should have been unwilling to disturb the value judgment made by the judge, who had had the benefit of receiving and hearing a considerable body of evidence. I do not think the judge misdirected himself in law, subject to that one point, and an appeal against his decision lies only on law. My one qualification is that the judge, quite rightly as matters then stood, paid close attention to Beatson J's decision in *E and S*, which had not then but has since been reversed by the Court of Appeal, rightly, as the House has now concluded. Had the judge had the benefit of the Court of Appeal's judgment in *E and S*, he would in all probability have found on balance that there was no deprivation of liberty in AF's case. On this basis I am willing to accept the view which I understand to be taken by my noble and learned friends, that the effect of the order was not to deprive AF of his liberty in breach of article 5.

Issue (2)

12. In the light of that conclusion, issue (2) does not arise. Had it done so, I would have upheld the judge's decision to quash the control order, for reasons I have given in *JJ and others*, paras 25 to 27.

Issue (3)

13. As explained in *JJ and others*, the conditions for making and upholding a non-derogating control order under sections 2(1)(a) and 3(10) of the 2005 Act are that the Secretary of State

> "(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
>
> (b) considers it necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual."

Before confirming a derogating control order under section 4(7) the court must first be

> "(a) … satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity; …"

14. Article 6 of the European Convention ("Right to a fair trial") provides in the opening sentence of paragraph (1)

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair … hearing …"

The article continues in paragraphs (2) and (3) to identify certain rights specific to those who have been charged with a criminal offence. These include the presumption of innocence (para (2)) and certain minimum rights, among them rights (para (3))

> "(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; …

(d) to examine or have examined witnesses against him …"

15. The Secretary of State accepts that control order proceedings fall within the civil limb of article 6(1) because they are in their effect decisive for civil rights, in some respects at least. But AF goes further. It is contended on his behalf that control order proceedings fall within the criminal limb of article 6 or, alternatively, that if they fall within the civil limb only they should nonetheless, because of the seriousness of what is potentially involved, attract the protection appropriate to criminal proceedings.

16. This is not a contention which can be lightly dismissed, for two reasons. First, it may very well be (although the point was not argued) that proceedings for a derogating control order are criminal in character. This was the unequivocal view of the Joint Committee on Human Rights (Twelfth Report of Session 2005-2006, HL Paper 122, HC 915), para 49:

> "In our view it is clear that the criminal limb of Article 6(1) ECHR applies to proceedings for a derogating control order. In such a case the full right to due process in Article 6(1) applies."

But, as the Council of Europe Commissioner for Human Rights pointed out in his Report of 8 June 2005, para 20, and the Joint Committee (para 52 of its report) agreed, the obligations imposed by a derogating control order differ from those in a non-derogating control order only in their degree of severity, and "It would be curious if at least immediately below this most extreme sanction, there were not other limitations or restrictions of sufficient severity to warrant the classification of the obligations as tantamount to a criminal penalty."

17. Secondly, the law on this subject is not altogether straightforward, since the Strasbourg jurisprudence has recognised the difficulty in some contexts of distinguishing between disciplinary and criminal proceedings (*Engel v The Netherlands* (*No 1*) (1976) 1 EHRR 647, para 82; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, paras 70-71) and even between civil and criminal proceedings (*Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 30). Control order proceedings, potentially applicable to all, lack the internal quality

characteristic of disciplinary proceedings. But in this country also judges have regarded the classification of proceedings as criminal or civil as less important than the question of what protections are required for a fair trial (*International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, paras 33, 148) and have held that the gravity and complexity of the charges and of the defence will impact on what fairness requires (*R v Securities and Futures Authority Ltd, Ex p Fleurose* [2001] EWCA Civ 2015, [2002] IRLR 297, para 14).

18. It was said in *Customs and Excise Commissioners v City of London Magistrates' Court* [2000] 1 WLR 2020, 2025 that in this country

> "criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and [that] the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

Thus if or when the relevant authority decides not to prosecute and there is no possibility of conviction or penalty, there are then no criminal proceedings: *S v Miller* 2001 SC 977, paras 20, 23; *R (R) v Durham Constabulary* [2005] UKHL 21, [2005] 1 WLR 1184, para 14. For present purposes, however, guidance on the distinction between determination of a civil right and obligation and determination of a criminal charge is to be found in the Strasbourg jurisprudence, and in particular in the leading case of *Engel*, above, para 82.

19. The starting point is to ascertain how the proceedings in question are classified in domestic law. This is by no means unimportant, since if the proceedings are classified as criminal in domestic law that will almost certainly be conclusive. But if (as is agreed to be the case here) the proceedings in question are classified as civil in domestic law, that is by no means conclusive. The language of article 6(1) is to be given an autonomous Convention meaning, that is, a Council of Europe-wide meaning applicable in all member states whatever their domestic laws may provide. Consistent with its constant principles of preferring substance to form and seeking to ensure that Convention rights are effectively protected, the European court is concerned to ascertain whether a proceeding is, in substance, civil or criminal : see, for

example, *Öztürk v Germany* (1984) 6 EHRR 409, para 53; *Lauko v Slovakia* (1998) 33 EHRR 994, para 58. It is recognised that member states may have many reasons for choosing to treat as civil proceedings which are in substance criminal. It is the substance which matters. More significant in most cases are the second and third *Engel* criteria, the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. Here we reach the heart of the argument.

20. The Secretary of State submits that there is in proceedings for a non-derogating control order no charge of an offence against the criminal law (in the French text no *"accusation en matière pénale"*). The counter-argument for AF is that there is in substance such a charge or accusation. The conduct of which a person must be reasonably suspected is past or present involvement in terrorism-related activity. The definition of "terrorism" in section 1(1) to (4) of the Terrorism Act 2000, incorporated in the 2005 Act by section 15(1), and the definition of "terrorism-related activity" in section 1(9) of the 2005 Act, are so comprehensive as to render criminal almost any activity which would fall within the definitions, as my noble and learned friend Baroness Hale recognised in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 223. To the extent that any loopholes have been thought to exist Parliament has sought to fill them.

21. I see great force in this approach. On any common sense view involvement in terrorism-related activity is likely to be criminal. But the Secretary of State is entitled to respond, as he does, that the controlled person is not charged with such conduct. This is not a point which turns on procedural requirements, which will vary from state to state. It is a point which turns on the distinction between suspecting A of doing X ("I suspect but I cannot prove": *Shaaban Bin Hussien v Chong Fook Kam* [1970] AC 942, 948) and asserting that A has done X. There is an obvious contrast between the reasonable suspicion required of the Secretary of State under sections 2(1)(a) and 3(10) of the Act and the satisfaction required of the court under section 4(7)(a). There is some analogy with the special supervision and protection measures imposed under Italian legislation, in so far as those cases fell within article 6(1) at all: see, for instance, *Guzzardi v Italy* (1980) 3 EHRR 333; *Ciulla v Italy* (1989) 13 EHRR 346; *M v Italy* (1991) 70 DR 59; *Raimondo v Italy* (1994) 18 EHRR 237; *Arcuri v Italy* (App no 52024/99, 5 July 2001, unreported).

22. The Secretary of State further submits that it is an essential feature of a criminal process that it exposes a person to the risk of conviction and punishment. Here, he says, controlled persons are exposed to no such risk. The counter-argument is that the proceedings expose the controlled person to adverse consequences of a very serious kind, more serious than the great majority of criminal penalties. Reliance is placed by analogy on observations of the Joint Committee on Human Rights ("Legislative Scrutiny: Fifth Progress Report", HL Paper 91, HC 490, 25 April 2007, para 1.13), made with reference to serious crime prevention orders.

23. It cannot be doubted that the consequences of a control order can be, in the words of one respected commentator, "devastating for individuals and their families" (Justice Chaskalson, "The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law," Seventh Sir David Williams Lecture, p 15). But the tendency of the domestic courts (not without criticism: see Ashworth, "Social Control and 'Anti-Social Behaviour': The Subversion of Human Rights?" (2004) 120 LQR 263) has been to distinguish between measures which are preventative in purpose and those which have a more punitive, retributive or deterrent object. Examples of the former are *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340; *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] QB 1213; and, most notably, *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787; of the latter, *Han v Customs and Excise Commissioners* [2001] EWCA Civ 1040, [2001] 1 WLR 2253; *International Transport Roth*, above. The same distinction is drawn in the Strasbourg authorities. Treated as non-criminal are preventative measures such as those in issue in the Italian cases already mentioned, *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, *Olivieira v The Netherlands* (2000) 30 EHRR CD 258, and *Landvreugd v The Netherlands* (App no 37331/97, 6 June 2000, unreported; treated as criminal were the measures considered in *Öztürk v Germany*, above; *Demicoli v Malta* (1991) 14 EHRR 47; *Benham v United Kingdom* (1996) 22 EHRR 293; *Lauko v Slovakia*, above; *Garyfallou AEBE v Greece* (1999) 28 EHRR 344. Even this distinction, however, is not watertight, since prevention is one of the recognised aims and consequences of punishment (see *R (West) v Parole Board* [2005] UKHL 1, [2005] 1 WLR 350) and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention.

24. I would on balance accept the Secretary of State's submission that non-derogating control order proceedings do not involve the determination of a criminal charge. Parliament has gone to some

lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order. I would reject AF's contrary submission. This reflects the approach of the English courts up to now: *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335, para 57. But I would accept the substance of AF's alternative submission: in any case in which a person is at risk of an order containing obligations of the stringency found in this case, or the cases of *JJ and others* and *E*, the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences. This has been the approach of the domestic courts in cases such as *B*, *Gough* and *McCann*, above, and it seems to me to reflect the spirit of the Convention.

Issue (4)

25. On 11 July 2002 the Committee of Ministers of the Council of Europe promulgated Guidelines on human rights and the fight against terrorism. The first two principles are :

> "I *States' obligation to protect everyone against terrorism*
>
> States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States' fight against terrorism in accordance with the present guidelines.
>
> II *Prohibition of arbitrariness*
>
> All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision."

For understandable reasons the Secretary of State lays particular stress on the first of these guideline principles, the controlled persons (MB and

AF) on the second. As observed in *R v H* [2004] UKHL 3, [2004] 2 AC 134, para 23, "The problem of reconciling an individual defendant's right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime is inevitably difficult to resolve in a liberal society governed by the rule of law." It is the problem with which Parliament grappled in the 2005 Act, and with which the House is confronted in these appeals.

26. The Schedule to the 2005 Act provides a rule-making power applicable to both derogating and non-derogating control orders. It requires the rule-making authority (para 2(b)) to have regard in particular to the need to ensure that disclosures of information are not made where they would be contrary to the public interest. Rules so made (para 4(2)(b)) may 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. Provision may be made for the appointment of a person to represent a relevant party (paras 4(2)(c) and 7). The Secretary of State must be required to disclose all relevant material (para 4(3)(a)), but may apply to the court for permission not to do so (para 4(3)(b)). Such application must be heard in the absence of every relevant person and his legal representative (para 4(3)(c)) and the court must give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest (para 4(3)(d)). The court must consider requiring the Secretary of State to provide the relevant party and his legal representative with a summary of the material withheld (para 4(3)(e)), but the court must ensure that such summary does not contain information or other material the disclosure of which would be contrary to the public interest (para 4(3)(f)). If the Secretary of State elects not to disclose or summarise material which he is required to disclose or summarise, the court may give directions withdrawing from its consideration the matter to which the material is relevant or otherwise ensure that the material is not relied on (para 4(4)).

27. Part 76 of the Civil Procedure Rules gives effect to the procedural scheme authorised by the Schedule to the 2005 Act. Rule 76.2 modifies the overriding objective of the Rules so as to require a court to ensure that information is not disclosed contrary to the public interest. Rule 76.1(4) stipulates that disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the UK, the detection or prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. Part III of the Rule applies to non-derogating control orders. It is

unnecessary to rehearse its detailed terms. Provision is made for the exclusion of a relevant person and his legal representative from a hearing to secure that information is not disclosed contrary to the public interest (rule 76.22). Provision is made for the appointment of a special advocate whose function is to represent the interests of a relevant party (rules 76.23, 76.24), but who may only communicate with the relevant party before closed material is served upon him, save with permission of the court (rules 76.25, 76.28(2)). The ordinary rules governing evidence and inspection of documents are not to apply (rule 76.26): evidence may be given orally or in writing, and in documentary or any other form; it may receive evidence which would not be admissible in a court of law; it is provided that "Every party shall be entitled to adduce evidence and to cross-examine witnesses during any part of a hearing from which he and his legal representative are not excluded".

28. In paragraph 178 of his written case the Secretary of State states that

> "It is not in dispute that as a general principle and in ordinary circumstances, the right to a fair trial in criminal and in civil proceedings under Article 6 includes the right to disclosure of relevant evidence: see eg *R (Roberts) v Parole Board* [2005] 2 AC 738 at [17] per Lord Bingham, and the cases there referred to."

In that paragraph reference is made to a number of Convention cases, some of them mentioned below. But the controlled persons submit with some force that the Secretary of State's qualified acceptance does less than justice to the fundamental principle here in issue.

29. In *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337, the Privy Council (*per* Lord Denning) described the right to be heard as one of the essential characteristics of natural justice. But he pointed out:

> "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 accused man 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 … 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."

Lord Morris of Borth-y-Gest repeated this ruling in *Ridge v Baldwin* [1964] AC 40, 113-114:

> "It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: *Kanda v Government of Malaya*. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case."

Much more recently, and in a Convention context, Lord Hope described the right to a fair trial as "fundamental and absolute" (*Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681, 719) and in *DS v Her Majesty's Advocate* [2007] UKPC D1 (22 May 2007, unreported), para 17, Lord Hope referred to and reaffirmed earlier observations to the effect that "the overriding right guaranteed by article 6(1) was a fundamental right which did not admit of any balancing exercise, and that the public interest could never be invoked to deny that right to anybody in any circumstances."

30. Similar statements may be found elsewhere. In *Charkaoui v Minister of Citizenship and Immigration* [2007] 1 SCR 350, McLachlin CJ, for the Supreme Court of Canada, observed (para 53) :

> "Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it."

That right was not absolute and might be limited in the interests of national security (paras 57-58) but (para 64):

> "… The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?"

In the recent case of *Hamdi v Rumsfeld* 542 US 507 (2004), O'Connor J, writing for the majority, said (p 533):

> "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. [Authority, cited]. 'For more than a century the central meaning of procedural due process has been clear : 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' …' These essential constitutional promises may not be eroded."

31. Statements to similar effect, less emphatically expressed, are to be found in the Strasbourg case law. In *Kostovski v Netherlands* (1989) 12 EHRR 434, paras 42, 44, a criminal case concerned with anonymous witnesses, the court observed :

> "… If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious … The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency …"

In *McMichael v United Kingdom* (1995) 20 EHRR 205, para 80, a family case concerning a child, the court said

> "Nevertheless, notwithstanding the special characteristics of the adjudication to be made, as a matter of general principle the right to a fair – adversarial – trial 'means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party'".

Lobo Machado v Portugal (1996) 23 EHRR 79 was a civil case concerning the applicant's right, in an adversarial hearing, to see and reply to material before the court. "That right", the court ruled (para 31),

> "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the Court's decision."

In *Van Mechelen v Netherlands* (1997) 25 EHRR 647, para 51, a criminal case, the court ruled:

> "In addition, all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence; as a general rule, paragraphs (1) and (3)(d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage."

In *Garcia Alva v Germany* (2001) 37 EHRR 335, para 42, another criminal case, the court said:

> "The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer."

32. As the Secretary of State correctly submits, the Strasbourg court has repeatedly stated that the constituent rights embodied in article 6(1) are not in themselves absolute. As it was put in *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52, and *Fitt v United Kingdom* (2000) 30 EHRR 480, para 45 (footnotes omitted),

> "However, as the applicant recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

The court has not been insensitive to the special problems posed to national security by terrorism: see, for instance, *Murray v United Kingdom* (1994) 19 EHRR 193, paras 47, 58. It has (as it was said in *Brown v Stott*, above, p 704) eschewed the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances, and has recognised the need for a fair balance between the general interest of the

community and the rights of the individual. But even in cases where article 6(1) has not been in issue, the court has required that the subject of a potentially adverse decision enjoy a substantial measure or degree of procedural justice: see *Chahal v United Kingdom* (1996) 23 EHRR 413, para 131; *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, para 97. In *Tinnelly & Sons Ltd and McElduff & Others v United Kingdom* (1998) 27 EHRR 249, para 72, the court held that any limitation of the individual's implied right of access to the court must not impair the very essence of the right.

33. Little assistance is gained from *R v H*, above, since the problem in that case related to the withholding by a prosecutor, on national security grounds, of material helpful to a defendant. There was no question of withholding from the defendant material adverse to him and relied on by the prosecutor, and it was held that if the fairness of the trial required disclosure to the defendant the prosecutor must either disclose or discontinue (para 36(6)). There is also little assistance to be gained from cases where, although evidence is withheld, the person receives an adequate summary, as the Strasbourg court understood to be the Canadian practice (see *Chahal*, above, para 144) and as was found to have been done in the Canadian cases of *Minister of Employment and Immigration v Chiarelli* [1992] 1 SCR 711, pp 745-746 and *Re Harkat* (2004) 125 CRR (2d) 319, para 32. There is, again, little help to be gained from reported cases in which the material not disclosed was not relied on, as was found to be so in *Bendenoun v France* (1994) 18 EHRR 54, para 52; *Jasper*, above, para 55; *Fitt*, above, para 48. The real problem arises where material is relied on in coming to a decision which the person at risk of an adverse ruling has had no adequate opportunity to challenge or rebut, as in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, paras 42, 44; *Van Mechelen v The Netherlands*, above, paras 62-65; *Luca v Italy* (2001) 36 EHRR 807, paras 43-45. In each of these cases the trial was found to be unfair.

34. In *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, there was a division of opinion among members of the House on the question (not relevant to these appeals) whether the Parole Board had power to adopt a special advocate regime. The hearing in question had yet to take place, and it could not at that stage be known whether, and to what extent, the Board would make a finding adverse to the applicant in reliance on evidence not disclosed to or challengeable by him. I myself doubted (para 19) whether a decision of the board adverse to the applicant, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had heard and which neither he nor they had had any opportunity to challenge or rebut, could

be held to meet the fundamental duty of procedural fairness required (in that case) by article 5(4). Lord Woolf, in the course of a detailed opinion, accepted (para 62) "the overriding obligation for a hearing to meet the requirements of article 5(4) and of appropriate standards of fairness required by domestic law" and accepted (para 68) the applicant's contention that there was "a core, irreducible, minimum entitlement" for him as a life sentence prisoner to be able effectively to test and challenge any evidence which decisively bore on the legality of his detention. In paragraph 78 he held that if a case were to arise where it was impossible for the board to make use of information that had not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing, then the rights of the prisoner would have to take precedence. The applicant had a fundamental right to be treated fairly (para 80) and what would be determinative in a particular case (para 83(vii)) would be whether, looking at the process as a whole, a decision had been taken by the board which involved significant injustice to a prisoner. In the opinion of Lord Steyn the proposed procedure (para 93) would override a fundamental right of due process and would (para 97) be contrary to the rule of law. Lord Rodger associated himself with certain statements of Lord Woolf, including his reference to a fundamental right to be treated fairly, but held (para 112) that the House could not decide in advance whether the full hearing, with a specially appointed advocate, would meet the requirements of article 5(4). My noble and learned friend Lord Carswell concluded (para 144) that the interests of the informant and the public should prevail over the interests of the applicant, strong though the latter might be. But he emphasised that he was making a decision in principle on the power of the board to appoint special advocates and their compatibility with article 5(4), and he accepted that there might well be cases in which it would not be fair and justifiable to rely on special advocates. Each case would require consideration on its own facts. I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him.

35. I do not for my part doubt that the engagement of special advocates in cases such as these can help to enhance the measure of procedural justice available to a controlled person. The assistance which special advocates can give has been acknowledged (for instance, in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863, para 34), and it is no doubt possible for such

advocates on occasion to demonstrate that evidence relied on against a controlled person is tainted, unreliable or self-contradictory. I share the view to which the Strasbourg court inclined in *Chahal*, above, para 131, repeated in *Al-Nashif*, above, para 97, that the engagement of special advocates may be a valuable procedure. But, as Lord Woolf observed in *Roberts* (para 60), "The use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him." The reason is obvious. In any ordinary case, a client instructs his advocate what his defence is to the charges made against him, briefs the advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage" is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain. I would respectfully agree with the opinion of Lord Woolf in *Roberts*, para 83(vii), that the task of the court in any given case is to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person (see also *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, para 10).

36. It is now necessary to apply these principles to the facts of these two appeals.

MB

37. MB is a 24 year-old student, born in Kuwait. He is a British citizen, naturalised as such in January 1998 after his mother was granted indefinite leave to remain. On 1 March 2005 he was seeking to fly to Syria from Manchester Airport when he was stopped and questioned by police officers and officers of the Security Service. On the following day he was at Heathrow, this time seeking to fly to Yemen, when he was again stopped and questioned by the police. His passport was seized and he was released. The content of these interviews is disputed. The Secretary of State asserts that on each occasion MB intended to travel on to Iraq to fight against coalition forces, which MB denies.

38. On 1 September 2005 the Secretary of State applied to the court under section 3(1)(a) of the 2005 Act for permission to make a non-derogating control order. The application was supported by a witness statement and an open statement with supporting documents. The open statement said, so far as material:

> "3. MB is an Islamist extremist who, as recently as March 2005, attempted to travel to Syria and then Yemen. The Security Service assessment is that MB was intending to travel onwards to Iraq …
>
> 8. The Security Service is confident that prior to the authorities preventing his travel, MB intended to go to Iraq to fight against coalition forces. Despite having been stopped from travelling once, MB showed no inclination to cancel his plans. The police prevented his travel on a second occasion, and seized his passport…"

The Secretary of State's application was also supported by a closed statement and further documents and an application to withhold the closed material. Permission was granted, subject to minor amendments, under section 3(2)(b) of the Act, and the order was made on 5 September 2005. The obligations imposed on MB by this order, plainly directed to preventing him leaving the country, were very much less stringent than in the cases of *JJ and others*, *E* and *AF*. Thus he was obliged to live at a specified address, to report to his local police station daily and to surrender his passport, and was forbidden to leave the UK or enter any airport or sea port, but he was otherwise subject to no geographical restriction, was subject to no curfew and was subject to no restriction on his social contacts. MB served a witness statement and the Secretary of State served a second open statement, which added little, and a second closed statement. The special advocate appointed to represent MB's interests did not challenge the Secretary of State's application to withhold the closed material, and accepted that it would not be possible to serve a summary which would not contain information or material the disclosure of which would be contrary to the public interest. The hearing under section 3(10) of the Act took place between 4-7 April 2006 before Sullivan J, who gave judgment on 12 April.

39. In his judgment (para 66) the judge recorded the description by counsel for the Secretary of State of his open case as "relatively thin"

and referred to part of the passage quoted in the last paragraph above. He observed (para 67) :

> "The basis for the Security Service's confidence is wholly contained within the closed material. Without access to that material it is difficult to see how, in reality [MB] could make any effective challenge to what is, on the open case before him, no more than a bare assertion."

Taking account also of other aspects of the hearing, on some of which he misdirected himself, the judge concluded that MB had not had a fair hearing (para 103).

40. The Court of Appeal thought it plain (para 27 of its judgment) that the justification for the obligations imposed on MB lay in the closed material, and it was the impact, on the facts of the case, of the provisions in the 2005 Act for the use of closed material that caused the court most concern (para 70). But having reviewed some of the authorities, it concluded (para 86) :

> "If one accepts, as we do, that reliance on closed material is permissible, this can only be on terms that appropriate safeguards against the prejudice that this may cause to the controlled person are in place. We consider that the provisions of the [2005 Act] for the use of a special advocate, and of the rules of court made pursuant to paragraph 4 of the Schedule to the [Act], constitute appropriate safeguards, and no suggestion has been made to the contrary."

41. The Council of Europe Commissioner for Human Rights, in paragraph 21 of his report referred to above (para 16), and the Joint Committee on Human Rights, in paragraph 76 of its report referred to above (para 16), had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person has no effective opportunity to challenge or rebut. This is not a case (like *E*) in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion

which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired.

AF

42. Ouseley J observed (in para 11 of his judgment) that the open case for a control order against AF was very short. AF came to the attention of the Security Service before his arrest in May 2006. It was alleged that he had links with Islamist extremists in Manchester, some of whom were affiliated to the Libyan Islamic Fighting Group. The LIFG became a proscribed organisation on 14 October 2005. The judge found (para 61) it to be clear that the essence of the Secretary of State's case against AF was in the closed material, and AF did not know what the case against him was. The open material disclosed to AF did not give grounds for reasonable suspicion (para 131), and it was not contended that it did. There were no more than links to extremists, who also had innocent links to him. The judge thought it clear (para 131) that more than reasonable grounds for suspicion existed, but only on the closed material. The judge was similarly satisfied that a control order was necessary (para 133) but that conclusion depended on the closed evidence. The judge accepted (para 146), without qualification, submissions by counsel for AF that no, or at least no clear or significant, allegations of involvement in terrorist-related activity were disclosed by the open material, that no such allegations had been gisted, that the case made by the Secretary of State against AF was in its essence entirely undisclosed to him and that no allegations of wrongdoing had been put to him by the police in interview after his arrest, affording him an idea by that side wind of what the case against him might be. Having noted the decision of the Court of Appeal in *MB* and the decision of the House in *Roberts*, above, the judge concluded (para 166) that there was no clear basis for a finding of incompatibility.

43. This would seem to me an even stronger case than *MB*'s. If, as I understand the House to have accepted in *Roberts*, above, the concept of fairness imports a core, irreducible minimum of procedural protection, I have difficulty, on the judge's findings, in concluding that such protection has been afforded to AF. The right to a fair hearing is fundamental. In the absence of a derogation (where that is permissible) it must be protected. In this case, as in *MB*'s, it seems to me that it was not.

Remedy

44. Since a majority of my noble and learned friends are of my opinion on the principles relevant to this issue, it is necessary to consider the question of remedy. In receiving and acting on closed material not disclosed to MB and AF, the courts below acted in strict accordance with the Act and the Rules. It was suggested in argument that the relevant provisions should be read down under section 3 of the Human Rights Act 1998, so that they would take effect only when it was consistent with fairness for them to do so. This would be a possible course, and it is plain that the provisions do not operate unfairly in all cases, as where the open material is sufficient to support the making of an order. But I question whether section 3 should be relied on in these cases, first, because any weakening of the mandatory language used by Parliament would very clearly fly in the face of Parliament's intention, and, secondly, because it might be thought preferable to derogate from article 6, if judged permissible to do so (on which I express no opinion whatever), than to accept any modification of the terms of the Act and the Rules. I therefore see force in the argument that a declaration of incompatibility should be made and the orders quashed. Having, however, read the opinions of my noble and learned friends Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood, I see great force in the contrary argument, and would not wish to press my opinion to the point of dissent. I therefore agree that section 3 should be applied, and the cases referred back, as they propose, for consideration in each case by the judge in the light of the committee's conclusions.

LORD HOFFMANN

My Lords,

45. MB is the subject of a control order made by the Secretary of State on 2 September 2005 (with the permission of Ouseley J) on the grounds that he was suspected of being an Islamist extremist who twice tried to go to Iraq to fight against coalition forces. On a review of the case, Sullivan J decided that the procedure by which closed material was withheld from MB was inconsistent with his right to a fair trial under article 6(1) of the European Convention. He made a declaration of incompatibility under section 4(2) of the Human Rights Act 1998. The

Court of Appeal reversed this decision and discharged the declaration. MB appeals.

46. AF is the subject of a control order made by the Secretary of State (with the permission of a judge) on 11 September 2006 (and varied on 18 October 2006) on the grounds that he was suspected of links with Islamist extremists, some of whom were affiliated to the Libyan Islamic Fighting Group, a proscribed terrorist organisation. On a review of the case, Ouseley J decided that the restrictions imposed by the order amounted to a deprivation of liberty within the meaning of article 5(1) of the Convention. In the absence of a derogation, the order was therefore unlawful. But he rejected a submission that the control order proceedings amounted to the determination of a criminal charge or that the withholding of closed material was inconsistent with AF's right under article 6 to a fair trial. The judge gave a leapfrog certificate and both sides appeal; the Secretary of State against the ruling on deprivation of liberty and AF against the rulings on article 6.

47. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and gratefully adopt his statement of the various restrictions imposed by the control order made against AF. For the reasons I gave in *Secretary of State for the Home Department v JJ* [2007] UKHL 45, I do not think that these restrictions come anywhere near amounting to a deprivation of liberty in the sense contemplated by the Convention and I therefore agree that the appeal of the Secretary of State on this point should be allowed.

48. I also agree with my noble and learned friend that a review of a control order is not the determination of a criminal charge. As a matter of English law, this is beyond doubt. MB and AF are not charged with having committed any breach of the law, let alone a terrorist act. The order is made on the basis of suspicion about what they may do in the future and not upon a determination of what they have done in the past. And the restrictions imposed by the order are for the purpose of prevention and not punishment or deterrence.

49. It is of course true that domestic law is not conclusive for the purposes of article 6. The term criminal charge has an autonomous Convention meaning which cannot be circumvented by the labels affixed in domestic law. But the Strasbourg jurisprudence recognises the distinction between determination and punishment of past guilt and prevention of future suspected wrongdoing: see the cases mentioned in

paragraphs 21 and 23 of Lord Bingham's opinion. We were not referred to any case in which a genuinely preventative measure based on suspicion of future conduct was held to be the determination of a criminal charge. On this point, domestic and Convention law agree.

50. The final question is whether the non-disclosure of the closed material is consistent with the right to a fair trial. On this question, the critical point appears to me to be that material can be withheld only if a judge has decided that disclosure would be contrary to the public interest. It is a judicial decision and not that of the Secretary of State: see paragraph 4(3) of the Schedule to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules. On the other hand, the Secretary of State may make a control order only if he has reasonable grounds for suspecting that the individual concerned is or has been involved in terrorism-related activity and that an order is necessary for "protecting members of the public from a risk of terrorism". If, on the evidence put before the judge on review, he considers that the decision of the Secretary of State was flawed, the order cannot stand.

51. Thus a decision that article 6 does not allow the Secretary of State to rely on closed material would create a dilemma: either he must disclose material which the court considers that the public interest requires to be withheld, or he must risk being unable to justify to the court an order which he considers necessary to protect the public against terrorism. It was this dilemma, and the way in which it should be resolved, which the Strasbourg court recognised in *Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 131:

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 (see paragraph 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."

52. The court described the Canadian procedure which they recommended as a model in paragraph 144:

> "[A] Federal Court judge holds an in camera hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant."

53. These remarks were made in the context of detention pending deportation, a deprivation of liberty in respect of which the person detained is entitled under article 5(4) to have the lawfulness of his detention determined by a court. They seem to me a fortiori applicable to an examination of the lawfulness of a non-derogating control order, which by definition involves no deprivation of liberty. The significant feature is that the Strasbourg court recognised that the confidentiality of security material should be maintained and that the State should be entitled to protect the public interest.

54. The Canadian model is precisely what has been adopted in the United Kingdom, first for cases of detention for the purposes of deportation on national security grounds (as in *Chahal*) and then for the judicial supervision of control orders. From the point of view of the individual seeking to challenge the order, it is of course imperfect. But the Strasbourg court has recognised that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest. The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security. There is no Strasbourg or domestic authority which has gone to the lengths of saying that the Secretary of State cannot make a non-derogating control order (or anything of the same kind) without

disclosing material which a judge considers it would be contrary to the public interest to disclose. I do not think that we should put the Secretary of State in such an impossible position and I therefore agree with the Court of Appeal that in principle the special advocate procedure provides sufficient safeguards to satisfy article 6.

55. I would therefore dismiss the appeals of MB and AF and allow the appeal of the Secretary of State against AF.

BARONESS HALE OF RICHMOND

My Lords,

56. On issues (1) to (3) identified by Ouseley J in the case of *AF*, I have nothing to add to the reasoning and conclusions of my noble and learned friend, Lord Bingham of Cornhill, with which I agree. On issue (4), however, my approach is somewhat different, an approach which I understand to be shared by my noble and learned friends, Lord Carswell and Lord Brown of Eaton-under-Heywood.

57. The object of all legal proceedings is to do justice according to law: but this is easily said and not so easily done. Doing justice means not only arriving at a just result but arriving at it in a just manner. The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly: CPR r. 1.1(1). Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject matter and nature of the proceedings.

58. The basic requirement is to know the case against one and to have an opportunity of meeting it. But in *In re K (Infants)* [1963] Ch 381, 405, Upjohn LJ identified more detailed principles of a judicial inquiry: "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." However, as Lord Devlin pointed out in the same case in the House of Lords, at [1965] AC 201, 238:

> " . . . a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed: otherwise it would become the master instead of the servant of justice."

If, as in that case, the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise: the modern principles are explained in *In re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593. A similar approach is taken in the Mental Health Review Tribunal Rules 1983, which allow evidence to be withheld from the patient if "disclosure would adversely affect the health or welfare of the patient or others": see rr. 6(4) and 12(2). But nothing may be withheld from a suitably qualified representative of the patient: see r. 12(3). That representative is then in the difficult position of not being able to share all the information which he has with his client; but overall there may still be a fair trial of the issues.

59. I mention these examples, not because they are factually similar to the present case, but to show that the problem is not a new one and that there are courts which have long been doing their best to try cases justly even though the ordinary principles of judicial inquiry identified by Upjohn LJ cannot be observed in every particular. If procedure is the servant rather than the master, then dealing with some cases "justly" may sometimes require a rather different approach (it follows that I take issue with CPR, r 76.2, which requires that in control order cases the overriding objective be read and given effect in a way which is compatible with the duty to ensure that information is not disclosed contrary to the public interest, thus apparently requiring that the court deal otherwise than justly with at least some cases).

60. The examples of cases concerning children and mental patients fall fairly and squarely within the problem which now confronts us in the control order cases. They too are hearings in which civil rights and obligations are determined for the purpose of article 6(1). I emphasise this, because the powerful submissions from Justice ask us to draw a distinction between such a case and, first, the withholding of information which the authorities do not intend to use to prove their case but which might be helpful to the other side (as in *R v H* [2004] 2 AC 134; and the Strasbourg cases cited in para 62 below), and second,

deportation cases in which the State has a right to deport on grounds of national security (as in *Chahal v United Kingdom* (1996) 23 EHRR 413). While non-disclosure and the use of special advocates might be acceptable in the last two situations, it is argued that it is not acceptable in the first.

61. But I do not think that we can draw such a clear distinction. *Chahal* may have been a deportation case in which Mr Chahal had no right to be here, but he had been deprived of his liberty for a very long time with a view to deportation, so his rights under article 5 were clearly engaged. There cannot be such a stark distinction between the requirements of article 5(4) and the requirements of article 6(1): and see *Al-Nashif v Bulgaria* (2002) 36 EHRR 655. The same applies to the Mental Health Review Tribunal Rules, where the issue is whether the patient should continue to be deprived of his liberty. If adaptations to enable the case to be dealt with justly are permissible in such cases, they must in principle be permissible in these.

62. Strasbourg has not yet had to deal with a case exactly on all fours with the present. The principles applicable to disclosure in criminal proceedings were laid down by the Grand Chamber in three cases decided on the same day: *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, paras 60, 61; *Jasper v United Kingdom* (2000) 30 EHRR 441, paras 51, 52; *Fitt v United Kingdom* (2000) 30 EHRR 480, paras 44, 45; repeated in *Edwards and Lewis v United Kingdom*: (2004) 40 EHRR 593, para 46 of the Judgment of the Grand Chamber, quoting paras 52 and 53 of the Judgment of the Chamber in 2003; see also *PG and JH v United Kingdom*, App no 44787/98, Judgment of 25 December 2001; *Atlan v United Kingdom* (2001) 34 EHRR 833; *Dowsett v United Kingdom*, App no 39482/98, Judgment of 24 June 2003; and most recently in *Botmeh and Alami v United Kingdom*, App No 15187/03, Judgment of 7 June 2007, para 37. The most important passage is the following:

> "However, . . . the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an

> important public interest. However, only such measures restricting the rights of the defence as are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities."

63. I take several messages from those cases which are helpful for present purposes. First, even in criminal proceedings, it is recognised that there may be competing interests, which include national security, the need to keep secret police methods of investigation, and to protect the fundamental rights of another person. Secondly, evidence may only be withheld if it is strictly necessary to do so. Thirdly, any difficulties caused to the defence must be "sufficiently counterbalanced" by the measures taken by the judicial authorities, that is, by the court itself. Fourthly, what is sufficient will be specific to the case in question. The European Court of Human Rights will not assess whether the non-disclosure was strictly necessary but will review "whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused" (*Rowe and Davis*, para 62). Fifthly, however, there is a difference between background information which is not essential to the outcome of the case and evidence which is crucial to its determination (cf, for example, the facts in *Edwards and Lewis* and *Botmeh and Alami*). Sixthly, in none of those cases did the court have the assistance of a special advocate as now provided for in that context as well as in control order cases.

64. In several of the above cases, however, the Strasbourg court contemplated that the use of a special advocate might have solved the problem: this is one of the counter-balancing measures which might be adopted by the judicial authorities. This House too has endorsed their use in non-disclosure claims in criminal proceedings: *R v H* [2004] 2 AC 134. The guidance given in that case relating to the treatment of material which may weaken the prosecution case or strengthen the defence case (para 36) could also be applied in control order cases.

65. However, it is necessary to go further than that, and ask whether the use of a special advocate can solve the problem where the Secretary of State wishes to withhold from the controlled person material upon which she wishes to rely in order to establish her case. We are all agreed

that these are not criminal proceedings for the purpose of article 6; in ordinary civil proceedings it is appropriate to give weight to the interests of each side; nevertheless, the state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy, in some cases seriously. It seems probable that Strasbourg would apply very similar principles to those applicable in criminal proceedings, but would be more inclined to hold that the measures taken by the judicial authorities had been sufficient to protect the interests of the controlled person. It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been "given a meaningful opportunity to contest the factual basis" for the order: see *Hamdi v Rumsfeld* 542 US 507 (2004), 509, col 2, O'Connor J.

66. I do not think that we can be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and Part 76 of the Civil Procedure Rules, would be sufficient to comply with article 6. However, with strenuous efforts from all, difficult and time consuming though it will be, it should usually be possible to accord the controlled person "a substantial measure of procedural justice". Everyone involved will have to do their best to ensure that the "principles of judicial inquiry" are complied with to the fullest extent possible. The Secretary of State must give as full as possible an explanation of why she considers that the grounds in section 2(1) are made out. The fuller the explanation given, the fuller the instructions that the special advocates will be able to take from the client before they see the closed material. Both judge and special advocates will have to probe the claim that the closed material should remain closed with great care and considerable scepticism. There is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases: see Serrin Turner and Stephen J Schulhofer, *The Secrecy Problem in Terrorism Trials*, 2005, Brennan Centre for Justice at NYU School of Law. Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client's instructions upon it. All must be alive to the possibility that the special advocates be given leave to ask specific and carefully tailored questions of the client. Although not expressly provided for in

CPR r 76.24, the special advocate should be able to call or have called witnesses to rebut the closed material. The nature of the case may be such that the client does not need to know all the details of the evidence in order to make an effective challenge.

67. The best judge of whether the proceedings have afforded a sufficient and substantial measure of procedural protection is likely to be the judge who conducted the hearing. It is highly significant that, in *AF* Ouseley J concluded, at [2007] EWHC 651 (Admin), para 167:

> "I should add that looking at the nature of the issue, namely necessary restrictions on movement in an important interest, and at the way in which the Special Advocates were able to and did deal with the issues on the closed material, I do not regard the process as one in which AF has been without a substantial and sufficient measure of procedural protection."

That is a judgment with which any appeal court should be slow to interfere.

68. But there may still be a few cases in which, under the scheme set out in the 2005 Act and rules, this is not possible. The material which is crucial to demonstrating the reasonable basis of the Secretary of State's suspicions or fears cannot be disclosed in any way which will enable the controlled person to give such answer as he may have. What is to happen then? The key provisions are in the Schedule to the 2005 Act. Paragraph 4(2)(a) provides that rules of court may:

> "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);"

More importantly, paragraph 4(3)(d) provides that rules of court *must secure*

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

This is carried through into CPR rule 76.2(2):

> "The court must ensure that information is not disclosed contrary to the public interest."

Further, in rule 76.29(8):

> "The court must give permission to the Secretary of State to withhold closed material where it considers that the disclosure of that material would be contrary to the public interest."

Disclosure contrary to the public interest is widely defined in rule 76.1(4):

> "For the purpose of this Part, 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."

69. On the face of it, therefore, the judge is precluded from ordering disclosure even where he considers that this is essential in order to give the controlled person a fair hearing. This would not matter if he were then in a position to refuse to uphold the order. However, he will have had all the relevant material which was available to the Secretary of State placed before him: see Schedule, para 4(3)(a) and CPR rule 76.27. The obvious intention is that he should take it into account even though it remains closed to the controlled person. Section 3(12) allows him to quash the order, to quash one or more of the obligations in the order, or to direct that the Secretary of State revoke or modify the order, but only if he considers that a decision of the Secretary of State was flawed. Section 3(13) provides that:

> "In every other case the court must decide that the control order is to continue in force."

70. But the judge is also a public authority for the purpose of the Human Rights Act and thus under a duty to act compatibly with the convention rights unless precluded from doing so by primary legislation which cannot be read in any other way: see 1998 Act, s 6(1),(2) and (3), and 2005 Act s 11(2). If, despite all the efforts of the judge and the special advocates to ensure that there is a fair hearing, the judge determines that the hearing cannot be fair unless more material is disclosed, the convention rights require that he be in a position to quash the order. On the face of it, therefore, section 3(13) of the Act may on occasions produce a result which is incompatible with the convention rights. However, this will not be so in every case. Indeed, my view is that the procedures can be made to work fairly and compatibly in many cases. It would not, therefore, be appropriate to make a declaration of incompatibility. The matter can be dealt with in a different way.

71. A similar situation arose in *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603. This concerned paragraph 11(1) of Schedule 22 to the Criminal Justice Act 2003, which provided that a single judge should set minimum terms for certain prisoners sentenced to life imprisonment "without an oral hearing". Yet in some but not all cases a hearing would be necessary if the judge was to adjudicate fairly. Rather than declare the provision incompatible, it was read subject to an implied condition that the judge had power to order a hearing where this was required in order to comply with the prisoner's rights under article 6. Admittedly, in that case it was not argued that such an interpretation was not possible under section 3 of the Human Rights Act 1998: the Government invited the court to take that course (mindful no doubt that a very similar course was taken in the leading case of *R v A (No 2)* [2002] 1 AC 45 and wishing to save the provision if it could). In this case the Secretary of State has argued that such an interpretation of the 2005 Act is not possible, but has not convincingly explained why it was possible in *Hammond* and is not possible here. I share the view of Lord Bingham, in para 44 above, that this would be a possible course. If it is possible, then section 3(1) of the 1998 Act requires that it be done.

72. In my view, therefore, paragraph 4(3)(d) of the Schedule to the 2005 Act, should be read and given effect "except where to do so would

be incompatible with the right of the controlled person to a fair trial". Paragraph 4(2)(a) and rule 76.29(8) would have to be read in the same way. This would then bring into play rule 76.29(7), made under paragraph 4(4) of the Schedule. Where the court does not give the Secretary of State permission to withhold closed material, she has a choice. She may decide that, after all, it can safely be disclosed (experience elsewhere in the world has been that, if pushed, the authorities discover that more can be disclosed than they first thought possible). But she may decide that it must still be withheld. She cannot then be required to serve it. But if the court considers that the material might be of assistance to the controlled person in relation to a matter under consideration, it may direct that the matter be withdrawn from consideration by the court. In any other case, it may direct that the Secretary of State cannot rely upon the material. If the Secretary of State cannot rely upon it, and it is indeed crucial to the decision, then the decision will be flawed and the order will have to be quashed.

73. Not only, in my view, are we required by Parliament to take this course if it is possible. There are several reasons why it is desirable for us to do so. First, when Parliament passed the 2005 Act, it must have thought that the provisions with which we are concerned were compatible with the convention rights. In interpreting the Act compatibly we are doing our best to make it work. This gives the greatest possible incentive to *all* parties to the case, and to the judge, to conduct the proceedings in such a way as to afford a sufficient and substantial measure of procedural justice. This includes the Secretary of State, who will, of course, be anxious that the control order be upheld. A declaration of incompatibility, on the other hand, would allow all of them to conduct the proceedings in a way which they knew to be incompatible. Secondly, there is good reason to think that Strasbourg would find proceedings conducted in accordance with the Act and rules compatible in the majority of cases. Inviting a derogation in order to cater for the minority where it might not so find may risk even greater incursions into the fundamental requirements of a fair trial which have not yet been shown to be necessitated by the exigencies of the situation. Thirdly, and above all, there are powerful policy reasons in support of procedures which enable cases to be proven through the evidence of infiltrators and informers rather than upon evidence which may have been obtained through the use of torture. Not only is the latter abhorrent, there is good reason to believe that it is generally unreliable and counter-productive. This House has ruled that such evidence is always inadmissible, but has placed the burden of proving this upon the person who wishes to challenge it: see *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221. It is particularly difficult for a person subject to control order proceedings to

do this. Devising a sufficient means of challenging the evidence is an incentive to the authorities to rely on better and more reliable sources of intelligence. That may sometimes mean keeping their identity, and sometimes some of the surrounding circumstances, secret. But that is an overall price worth paying for the good of all.

74. It follows that I cannot share the view of Lord Hoffmann, that the use of special advocates will always comply with article 6; nor do I have the same difficulty as Lord Bingham, in accepting that the procedure could comply with article 6 in the two cases before us. It is quite possible for the court to provide the controlled person with a sufficient measure of procedural protection even though the whole evidential basis for the basic allegation, which has been explained to him, is not disclosed.

75. In the case of *MB*, the Court of Appeal corrected the major premise which underpinned the declaration of incompatibility made by the trial judge: that the court was limited to reviewing the Secretary of State's decision on the basis of the information available to her when that decision was made. But the Court of Appeal also took the view that the use of a special advocate constituted an appropriate safeguard: [2007] QB 415, para 86. They allowed the Secretary of State's appeal and ordered that the validity of the control order be reconsidered. That remains the appropriate outcome, although the case now falls to be reconsidered in the light of the majority opinions in this House.

76. The case of *AF* is more difficult, because of the judge's view that there had been a "substantial and sufficient measure of procedural protection". It is tempting, therefore, simply to allow the Secretary of State's appeal on the first (the deprivation of liberty) issue and leave the control order in place. However, the judge had already concluded that the control order should be quashed as a deprivation of liberty; moreover he was bound by the decision of the Court of Appeal in *MB*. In fairness, AF should have the opportunity of having his case heard in accordance with the approach approved in this House. I would therefore send that case back also.

LORD CARSWELL

My Lords,

77. The four issues in AF's appeal have been set out in paragraph 3 of the opinion of my noble and learned friend Lord Bingham of Cornhill and I need not repeat them. The issue in MB's appeal is similar to that in the fourth issue of AF's appeal, and is in essence whether the control orders can stand in the light of the withholding of closed material from the appellants, taking into account the use of special advocates at their hearings.

78. On the first issue in AF's case, whether the effect of the control order was a deprivation of his liberty within the meaning of article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), I would refer to my opinion in *JJ and others v Secretary of State for the Home Department* [2007] UKHL 45. For the reasons which I set out in that opinion I do not consider that AF was deprived of his liberty by the control order. I cannot agree with Ouseley J's conclusion on this issue, on which the Secretary of State is entitled to succeed. The second issue accordingly does not arise. I would allow the Secretary of State's appeal on these issues.

79. The third issue is whether non-derogating control order proceedings constitute the determination of a criminal charge within the meaning of article 6 of the Convention. I agree with the conclusion expressed by Lord Bingham (para 24 of his opinion in this appeal) that it does not, and with his reasons for reaching that conclusion. It is not in dispute that the civil limb of article 6(1) applies to the examination of control orders by the courts and the person subject to such an order (to whom I shall refer for convenience, albeit inelegantly, as the controlee) is entitled to a fair hearing. The question of what prevents a hearing from being fair brings one to the fourth issue.

80. The necessity to furnish a controlee with sufficient material to understand the case made against him and to be in a position to contest it is very clearly established, and it is not necessary for me to cite the many authorities on the point. It is recognised, however, both in domestic law and in the Strasbourg jurisprudence that in some contexts it may be legitimate to withhold a certain amount of significant material

from a party where there are sufficiently strong countervailing reasons to set against the individual's right grounded in article 6 to have knowledge of and be able to contest the case against him. The European Court of Human Rights accepted in *Edwards and Lewis v United Kingdom* (2004) 40 EHRR 593, para 46, p 609 that the safeguarding of an important public interest may at times justify the withholding of evidence. In *Rowe v United Kingdom* (2000) 30 EHRR 1 the Court said at paragraphs 61-62:

> "61. However, as the applicants recognised, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.
>
> 62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."

The need to protect a state's citizens from the risk of terrorist attack is one of the most important and pressing competing interests, as the ECtHR has recognised in a series of decisions: see, eg, *Klass v Germany* (1978) 2 EHRR 214, *Murray v United Kingdom* (1994) 19 EHRR 193 and *Chahal v United Kingdom* (1996) 23 EHRR 413.

81. The ECtHR has also accepted that expedients such as the use of special advocates may in principle give sufficient protection to the individual's rights to satisfy the requirements of article 6. In *Chahal v United Kingdom* (1996) 23 EHRR 413 it said at paragraph 131 of its judgment:

> "131. The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13, in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."

The reference to these techniques is to the use of special advocates to represent the interests of the individual concerned, which the Court described in more detail in paragraph 144. Similarly, in *Al-Nashif v Bulgaria* (2002) 36 EHRR 655 the Court noted United Kingdom legislation providing for the appointment of special counsel and went on to say (para 97):

> "97 Without expressing in the present context an opinion on the conformity of the above system with the Convention, the Court notes that, as in the case of *Chahal*, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice."

The Court did, however, define a limit to this in *Tinnelly & Sons Ltd and McElduff & Others v United Kingdom* (1998) 27 EHRR 249 at paragraph 72, where it stated that limitations must not restrict or reduce the individual's access to the court "in such a way or to such an extent that the very essence of the right is impaired." The House was referred

to a litany of cases in which the ECtHR held that where material had been withheld from an individual there was a breach of article 6, but in none of them was a special advocate employed to represent his interests, and accordingly the assistance to be derived from these decisions is limited.

82. The House has had occasion to consider the use of special advocates on a couple of occasions. One cannot obtain much assistance from the decision in *R v H, R v C* [2004] UKHL 3, [2004] 2 AC 134, where the issues which arose were not comparable with those in the present appeals. More can be gained, however, from *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, notwithstanding the differences in context and governing legislation. This case has been discussed by Lord Bingham in paragraph 34 of his opinion, and I shall not rehearse the details of the issues. The members of the Appellate Committee were all conscious of the grave extent of the disadvantage imposed upon the individual if material is withheld from his legal representatives as well as himself and his interests are represented only by a special advocate. As in *Roberts,* I would not seek to minimise these disadvantages, and in the present context the impact upon the individual's interests is at least as significant as in a parole hearing. The majority were, however, prepared to accept that the Parole Board had in principle power to withhold information and appoint special advocates to represent prisoners' interests, while declining to decide at that stage on the fairness of their use in the appeal before the House. They emphasised that their decision only extended to accepting in principle that the use of a special advocate did not necessarily infringe the right to a fair hearing, but were not prepared to hold that that procedure would constitute a fair procedure in all cases. Lord Woolf said at paragraph 83:

> "What will be determinative in a particular case is whether looking at the process as a whole a decision has been taken by the board using a procedure that involves significant injustice to the prisoner. If there has been, the decision should be quashed."

83. In the present case one has to balance two interests, that of the controlee and the public interest, without the added factor of protecting the informant. Both interests are clear and strong, but in my opinion it is possible to accommodate both with an appropriate balance. The House was referred to a number of expressions of concern about the limits on the value of the representation of a controlee's interests afforded by a

special advocate. Lord Woolf CJ remarked, however, in the Court of Appeal in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324 [2004] 2 All ER 863, para 34:

> "(i) Having read the transcripts, we are impressed by the openness and fairness with which the issues in the closed session were dealt with by those who were responsible for the evidence given before SIAC (ii) We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process."

84. In MB's case Sullivan J concluded that there was inherent unfairness in a hearing under section 3(10) of the Prevention of Terrorism Act 2005 and proceeded to make a declaration of incompatibility. But that remedy is to be regarded as a measure of last resort, to be avoided unless it is plainly impossible to do so: *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, para 44, per Lord Steyn. I do not consider that the provisions of the 2005 Act and CPR Part 76 are necessarily incapable of being made to operate compatibly with article 6. It seems to me possible to imply into them, and in particular into paragraph 4(2)(a) and 4(3)(d) of the Schedule to the 2005 Act, a qualification that the powers conferred do not extend to withholding particulars of reasons or evidence where to do so would deprive the controlee of a fair trial. The House adopted a comparable course in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, when it was willing (Lord Hope of Craighead dubitante) to imply a provision into section 41 of the Youth Justice and Criminal Evidence Act 1999 that evidence or questioning which was required to ensure a fair trial under article 6 should not be treated as inadmissible: see para 45, per Lord Steyn. Similarly, in *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, the Divisional Court was willing to interpolate a qualification such as that which I propose into paragraph 11(1) of Schedule 22 to the Criminal Justice Act 2003. Before the House the Secretary of State expressly accepted that if paragraph 11(1) was found to be incompatible with the Convention, it should be read subject to such an implied condition. It was therefore unnecessary to reach a considered decision on whether such an interpolation would be sustainable, but although Lord Hoffmann described it as a "bold exercise in 'interpretation'", the House accepted it.

85. There is a very wide spectrum of cases in which closed material is relied on by the Secretary of State. At one extreme there may be cases in which the sole evidence adverse to the controlee is closed material, he cannot be told what the evidence is or even given its gist and the special advocate is not in a position to take sufficient instructions to mount an effective challenge to the adverse allegations. At the other end there may be cases where the probative effect of the closed material is very slight or merely corroborative of strong open material and there is no obstacle to presenting a defence. There is an infinite variety of possible cases in between. The balance between the open material and the closed material and the probative nature of each will vary from case to case. The special advocate may be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee. These are matters for the judge to weigh up and assess in the process of determining whether the controlee has had a fair trial. The assessment is, as Lord Woolf said in *Roberts* at paragraph 77, fact-specific. The judge who has seen both the open and the closed material and had the benefit of the contribution of the special advocate is in much the best position to make it. I do consider, however, that there is a fairly heavy burden on the controlee to establish that there has been a breach of article 6, for the legitimate public interest in withholding material on valid security grounds should be given due weight. The courts should not be too ready to hold that a disadvantage suffered by the controlee through the withholding of material constitutes a breach of article 6.

86. In MB's case Sullivan J stated at paragraph 67 of his judgment, and it has not been the subject of dispute, that the evidence implicating MB in terrorist activities is wholly contained within the closed material. He stated his view in paragraph 74 that where the substantial part of the case against him was not disclosed to the controlee, it was difficult to see how the very essence of his right of access to the court was not impaired. He did take the view, however, which the Court of Appeal declared to be incorrect, that the court could not take into account any potentially exculpatory information identified by the special advocate which might cast a different and less unfavourable light on the closed material. I would send the matter back to the Administrative Court to review the overall fairness of the appeal hearing in the light of the opinions of the House and those of the Court of Appeal. The Court of Appeal proposed to take this course and I accordingly would uphold its decision and dismiss MB's appeal, though for my own somewhat differing reasons, which accord with those given by my noble and learned friends Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood.

87. In AF's case Ouseley J accepted at paragraph 146 of his judgment that "no, or at least no clear or significant, allegations of involvement in terrorist-based activity are disclosed by the open material, nor have any such allegations been gisted." Again, this finding has not been challenged. As in MB's case, it is difficult to see how this could constitute a fair hearing, unless the contribution of the special advocate was such as to make a significant difference. At paragraph 167 the judge referred to "the way in which the Special Advocates were able to and did deal with the issues on the closed material", but it is not spelled out in the judgment how significant their contribution was. The judge has not made a decision on the overall fairness of the hearing and its compliance with article 6, and in these circumstances I would allow the Secretary of State's appeal, reverse the judge's order quashing the control order and send the case back to the Administrative Court for reconsideration in the light of the opinions expressed by the House.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

88. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and gratefully adopt his exposition of the relevant facts and law and his identification of the issues now arising on these two appeals.

89. AF's control order subjected him to a fourteen hour curfew. For the reasons given in my judgment in JJ's case I do not regard that as involving a sufficient degree of physical confinement to constitute a deprivation of liberty as opposed to a restriction of AF's freedom of movement. Plainly it is a very severe restriction on that freedom and by virtue of that restriction together with the various additional restrictions inherent in the other conditions and circumstances of AF's order it interferes too with a number of AF's Convention rights (most notably perhaps those under articles 8, 9 and 10). But these are all qualified rights (as too would be AF's right to freedom of movement had the UK in fact conferred it upon him by ratifying Protocol 4) and it is noteworthy that neither AF nor, indeed, any of the other appellants before your Lordships have sought to challenge the justification for these various restrictions nor their proportionality. I accordingly agree with all your Lordships that the Secretary of State's appeal should succeed on this aspect of AF's case.

90. With regard to AF's cross appeal on the article 6 issues, and MB's appeal against the Court of Appeal's ruling that section 3 of the 2005 Act is compatible with his right to a fair hearing under article 6 of the Convention, I agree with much of Lord Bingham's opinion. In particular I agree with his conclusions at paragraph 24 that non-derogating control order proceedings do not involve the determination of a criminal charge but that nevertheless those against whom such orders are proposed or made are entitled to such measure of procedural protection as is commensurate with the gravity of the potential consequences. I agree too with Lord Bingham's convincing analysis of the authorities at paras 25 to 34 and his conclusion at para 35 that the court's task in any given case is to decide whether the process as a whole has occasioned significant injustice to the person concerned (the suspect). I agree further that the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so. There may perhaps be cases, wholly exceptional though they are likely to be, where, despite the best efforts of all concerned by way of redaction, anonymisation, and gisting, it will simply be impossible to indicate sufficient of the Secretary of State's case to enable the suspect to advance any effective challenge to it. Unless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded (a difficult but not, I think, impossible conclusion to arrive at ? consider, for example, the judge's remarks in AF's own case, set out by my noble and learned friend Baroness Hale of Richmond at para 67 of her opinion), he would have to conclude that the making or, as the case may be, confirmation of an order would indeed involve significant injustice to the suspect. In short, the suspect in such a case would not have been accorded even "a substantial measure of procedural justice" (*Chahal v United Kingdom* (1996) 23 EHRR 413 at para 131) notwithstanding the use of the special advocate procedure; "the very essence of [his] right [to a fair hearing] [will have been] impaired" (*Tinnelly & Sons Ltd* and *McElduff and others v United Kingdom* (1998) 27 EHRR 249, para 72).

91. 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.

92. The judges in AF's and MB's cases both appear to have regarded the disclosure made (or capable of being made consistently with the public interest) as insufficient to allow of any effective challenge. In these circumstances I agree with the majority of my noble and learned friends that both cases should now be remitted to the Administrative Court for a final decision as to whether nonetheless it is possible to confirm the control orders consistently with there having been overall fairness in the appeal process. If the judges' final decision is that the control orders cannot fairly be made, then, in common with Lord Carswell and Baroness Hale, with both of whose reasoning on this part of the case I entirely agree, rather than make a declaration of incompatibility, I would instead invoke section 3 of the Human Rights Act 1998 in the manner and with the consequences they suggest.