HOUSE OF LORDS

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[2009] UKHL 28

on appeal from: [2008]EWCA Civ 1148

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for the Home Department (Respondent) *v* AF (Appellant) (FC) and another (Appellant) and one other action

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
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Lord Brown of Eaton-under-Heywood

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Introduction

1. The three appellants, AF, AN and AE, are subject to non-derogating control orders ("control orders") involving significant restriction of liberty. A control order was first made against AF on 24 May 2006, against AN on 4 July 2007 and against AE on 15 May 2006. Each control order was made pursuant to section 2 of the Prevention of Terrorism Act 2005 ("the PTA") on the ground that the Secretary of State had reasonable grounds for suspecting that the appellant was, or had been, involved in terrorism-related activity. The issue raised by their appeals is whether, in each case, the procedure that resulted in the making of the control order satisfied the appellant's right to a fair hearing guaranteed by article 6 of the European Convention on Human Rights ("article 6") in conjunction with the Human Rights Act 1998 ("the HRA"). Each contends that this right was violated by reason of the reliance by the judge making the order upon material received in closed hearing the nature of which was not disclosed to the appellant.

The history of control orders

2. After the tragic events of September 11 2001 the Secretary of State made a Derogation Order under section 14 of the HRA and then enacted the Anti-terrorism, Crime and Security Act 2001 ("the ATCSA"). Section 23 of the ATCSA gave the Secretary of State the power to detain a suspected international terrorist with a view to his

intended deportation. A suspected international terrorist was an alien whose presence in the United Kingdom the Secretary of State reasonably believed to be a risk to national security and whom he reasonably suspected to be a terrorist. An appeal against certification as a suspected international terrorist lay to the Special Immigration Appeals Commission ("SIAC"). Provision was made for SIAC to receive material in closed hearings at which the suspects would be represented by special advocates, who would not be permitted to consult their clients in order to take instructions in relation to the closed material.

3. In *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 this House quashed the Derogation Order and declared section 23 of the ATCSA incompatible with articles 5 and 14 of the Convention. Parliament's response was to enact the PTA, which made provision for the making of derogating and non-derogating control orders.

The PTA

4. The following are the relevant provisions of the PTA:

Section 2(1) gives the Secretary of State power to make a control order against an individual if he:

> "(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
>
> (b) considers that it is 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."

Section 3 makes provision for the supervision by the court of the making of control orders. Section 3(10) makes provision for a hearing ("the section 3(10) hearing") at which the function of the court is to determine whether the decision of the Secretary of State that the requirements of section 2(1)(a) and (b) were satisfied and that the obligations imposed by the order were necessary was flawed.

5. The rules that govern a section 3(10) hearing were summarised by Lord Bingham of Cornhill in *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] AC 440, to which I shall shortly be referring, and I shall gratefully adopt that summary:

> "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 (paragraph 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 (paragraph 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: paragraphs 4(2)(c) and 7. The Secretary of State must be required to disclose all relevant material (paragraph 4(3)(a)), but may apply to the court for permission not to do so: paragraph 4(3)(b). Such application must be heard in the absence of every relevant person and his legal representative (paragraph 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: paragraph 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 (paragraph 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: paragraph 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: paragraph 4(4).
>
> 27. CPR Pt 76 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 United Kingdom, 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 by rule 76.26(5) 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'."

6. 38 individuals have been subjected to control orders under the PTA. Of these 7 have absconded. Those who did not abscond, or some of them, have generated an extraordinary volume of litigation. The section 3(10) hearings themselves are substantial undertakings, involving as they do open and closed hearings and two sets of advocates representing those who are subject to the orders, whom I shall describe by the inelegant invented noun as "controlees". The care and industry devoted by both judges and advocates to ensuring that the interests of the controlees are properly considered deserves recognition. It exemplifies the respect that is accorded by those involved in the administration of justice in this country both to human rights and to the rule of law.

7. The section 3(10) hearing in many cases proved merely the start of a lengthy saga. The Court of Appeal at paragraphs 9 and 10 describes the series of substantial hearings that have involved AF. This is the second time that his case has been before this House and the eighth substantial hearing that it has received. Nor will this be the last. I propose to pick up the story on the occasion that the case of MB came

before the Court of Appeal, a hearing over which I presided. MB and AF were subsequently co-appellants to this House.

Secretary of State for the Home Department v MB

8. This appeal [2006] EWCA Civ 1140, [2007] QB 415 was brought by the Secretary of State against a decision of Sullivan J holding the PTA incompatible with the Convention. One of the reasons for so holding was that MB had not had a fair hearing in that the court had been constrained by the provisions of the PTA to reach a decision on the basis of closed evidence of which MB was unaware and which he was therefore not in a position to controvert. The Judge had found that the case against MB was wholly contained within the closed material and that, without access to this material, MB could not make an effective challenge to what was, in the open case, no more than a bare assertion.

9. The Court of Appeal accepted that the justification for imposing the control order on MB lay in the closed material. It held, however, that the use of closed material had already been approved in earlier decisions of the Court of Appeal which were binding on the court. It reversed the judge both on this issue and on others raised by the appeal, which was accordingly allowed.

10. MB appealed to this House, together with AF. Once again other issues were raised by that appeal that are not material to the present debate. As in *MB* the Secretary of State's case against AF lay in the closed material. On the section 3(10) hearing [2007] EWHC 651 (Admin) Ouseley J had held at para 61 that it was clear that the essence of the case against AF was in the closed material and that he did not know what that case was. The judge concluded, however, at 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."

11. Lord Bingham did not share this view. He quoted a series of judicial dicta from sources of high standing to the effect that a fair hearing requires that a party must be informed of the case against him so that he can respond to it. Commenting on the decision of this House in *R (Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, he remarked at para 34:

> "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."

12. Lord Bingham expressed the following conclusion at para 41 in respect of MB:

> "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."

In relation to AF, Lord Bingham said this, as para 43:

> "This would seem to me an even stronger case than *MB*'s. If, as I understand the House to have accepted in *Roberts*, 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."

13. Lord Hoffmann took a different view. He considered that the use of closed material, coupled with the protection afforded by special advocates, had been approved by the Strasbourg court:

> "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* 23 EHRR 413, para 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 interveners pointed out in connection with article 13 (see para 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 para 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.'"

14. Lord Hoffmann commented, at para 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."

15. The remaining three members of the committee reached conclusions which fell between those of Lord Bingham and Lord Hoffmann. They expressed the view that in some cases it would be possible for the controlee, with the assistance of the special advocate, to have a fair trial notwithstanding the admission of closed material and that in others it would not. The fair trial issue was fact specific and the trial judge was best placed to resolve it.

16. Baroness Hale of Richmond at para 66 expressed the view that one could not be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used would be sufficient to comply with article 6 but that, with strenuous efforts from all, it should usually be possible to accord the controlled person "a substantial measure of procedural justice" – the phrase used by the Strasbourg court in *Chahal.* Significantly, she was also inclined to accept the view of Ouseley J that this test had been satisfied in the case of AF, notwithstanding that the judge had observed that the essence of the case against him lay in the closed material.

17. In expressing her conclusions, Baroness Hale said this at para 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."

The last sentence of this passage contains an ambiguity. "Even though the whole evidential basis…is not disclosed" could mean (i) "even though none of the evidential basis is disclosed" or (ii) "even though not all of the evidential basis is disclosed". It seems that some have read it in one way and some in another.

18. If some found Baroness Hale's observations to be to some extent enigmatic, the same was true to a greater degree in respect of a passage in para 90 of the opinion of Lord Brown of Eaton-under-Heywood:

> "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."

19. The portion that I have emphasised has given rise to debate as to whether the House recognised a "makes no difference" principle under which fair process does not require that the nature of the case against the controlee should be disclosed to him if the cogency of the closed material is such as to satisfy the judge that no effective challenge could be made to it.

20. The conclusion of the majority of the House was that there would be cases, albeit rare ones, where the failure to disclose closed material to the controlee would be incompatible with the article 6 requirement of a fair trial. Baroness Hale proposed that in these circumstances it was both possible and desirable to read down the relevant statutory provisions rather than make a declaration of incompatibility. She said, at para 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."

Not only did this proposal find favour with Lord Carswell and Lord Brown; it was accepted, not without reservation, by Lord Bingham. Each case was remitted to the trial judge for further consideration in the light of the observations of the committee.

21. The decision in *MB* was received with some reservations. The House will be aware of expressions of concern in two respects. First it was suggested that, perhaps because the House had deliberately chosen not to view the closed material, it had taken too sanguine a view of the extent to which Special Advocates could respond effectively to material on which they were not able to take instructions from those they represented. Secondly the question of whether the House had approved a "makes no difference" principle was giving rise to uncertainty. Had it done so or, conversely, did it follow from the decision of the House that there was a "core irreducible minimum" of the allegations against a controlee that had to be disclosed? These concerns led the Court of Appeal to take the unusual course of granting permission to appeal in the present case.

The relevant facts in these appeals

22. There is no need to review in any detail the facts relating to each appellant. What is significant is the extent to which the case against each was disclosed to him, and this is in each case sufficiently spelt out by the judge concerned.

AF

23. AF has both United Kingdom and Libyan nationality. He was born in the United Kingdom in 1980 but brought up in Libya. His English mother is divorced from his Libyan father. He came to England with his father in December 2004. The open case against him alleged links with Islamist extremists, some of whom are affiliated to an organisation proscribed under the Terrorism Act 2000. He established that he had innocent links with those who were named. Additional disclosure that was made in relation to a trip by AF to Egypt added nothing significant to the case against him. It is common ground that the open material did not afford the Secretary of State reasonable grounds for suspicion of involvement by AF in terrorism-related activity. The case against him was to be found in the closed material.

24. AF's case following remission came before Stanley Burnton J. In a judgment delivered on 10 March 2008 [2008] EWHC 453 (Admin) he held that although the special advocates had done all that was reasonably possible without instructions from AF, the absence of such instructions had meant that their efforts were ineffective. Subject to one point, the Secretary of State would have to elect between making further disclosure or allowing the control order to be quashed. That point was that there was one aspect of the case against AF on which the judge could be "quite sure that in any event no possible challenge could conceivably have succeeded". If the "makes no difference" principle fell to be applied, then the control order would stand. He held a separate hearing on the issue of whether the "makes no difference" principle had been laid down by the majority of the House in *MB* and concluded that it had not [2008] EWHC 689 (Admin).

AN

25. AN is a British citizen, born in Derby in 1981. In September 2005 he moved with his wife and son to Syria. There he was detained and deported to the United Kingdom in March 2007. The open case against him included alleged connection with extremists and made

general allegations of involvement in attack planning and facilitation of the participation by extremists in terrorism-related activities overseas. In the open judgment after the section 3(10) hearing dated 29 February 2008 [2008] EWHC 372 (Admin) Mitting J held, for reasons set out in the closed judgment, that he was satisfied that AN had not had disclosed to him a substantial part of the grounds for suspecting that he had been involved in terrorism-related activity and that without disclosure he would not be in a position personally to meet those aspects of the case against him.

26. Mitting J summarised his perception of the effect of the decision of this House in *MB* and its consequences as follows:

> "9. The conclusion which I draw from the four speeches of the majority in *MB* is that unless, at a minimum, the special advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them. In practice, this means that he must be told their gist. This means that, if he chooses to do so, he can give and call evidence about the issues himself.
>
> 10. AN does not know the gist of significant grounds of suspicion raised against him. I have already determined, in a closed judgment, that the material which I have considered is capable of founding reasonable grounds to suspect that he has been involved in terrorism related activity. I have identified in a closed disclosure judgment what must be disclosed to him to fulfil his right to a fair hearing in accordance with my understanding of the speeches of the majority in *MB*. I do so with disquiet, because the factors which require further disclosure in this case are likely to arise in many others, with the result that the non-derogating control order procedure may be rendered nugatory in a significant number of cases in which the grounds for suspecting that a controlled person has been involved in terrorism related activities may otherwise be adjudged reasonable."

He put the Secretary of State to her election to disclose the material that he had identified in his closed judgment or to cease to rely on it, but stayed the effect of his order pending her appeal to the Court of Appeal.

AE

27. AE is an Iraqi national. He entered the United Kingdom in January 2002 and claimed political asylum. Relatively lengthy allegations of grounds for suspicion of AE's involvement in terrorism-related activities were made in the open proceedings, but these were almost all in very general terms - too general for any response other than a general denial to be expected. Typical is the first and perhaps the most serious allegation:

> "The security service investigation of AE has revealed he has a considerable jihadi pedigree, and that prior to his arrival in the UK he took part in both terrorist training and activities".

28. It fell to Silber J to apply *MB* to AE's case, and that on two occasions. The first was on a section 3(10) hearing in relation to a second control order made by the Secretary of State in place of an initial order that she had withdrawn. Judgment was given on 1 February 2008 [2008] EWHC 132 (Admin). The second related to the renewal of that order and to issues arising in relation to its variation. Judgment was given on 20 March 2008 [2008] EWHC 585 (Admin).

29. In the first judgment Silber J concluded in para 40 that the effect of *MB* was that he had to ascertain "looking at the process as a whole, whether a process has been used which involved a serious injustice to the controlled person". He held, having particular regard to the role played by the special advocate in the closed hearing, that it had not.

30. Silber J analysed the judgment in *MB* in much greater depth in his second judgment. He accepted in para 43 that the open case for the Secretary of State went "nowhere near setting out the full case against AE", but concluded that it did not follow from this that the procedure was unfair. Earlier he summarised the effect of the decision of this House in *MB* as follows:

> "So my conclusion is that there is no minimum level of information which has *invariably* in every case to be set out in the open material to ensure compliance with the article 6 rights of the controlled person. Indeed the task of the court in deciding if there has been an infringement of the controlled person's article 6 rights is to look with the appropriate intense care described in *MB* at what occurs in the closed proceedings as well as considering the open evidence and the open proceedings."

31. In reaching this conclusion Silber J stated that he had borne in mind that

> "the information disclosed in the open case was very scant and three members of the Appellate Committee concluded that it would be exceptional for there to be a finding of infringement with article 6 rights of a controlled person when the special advocate procedure is adopted. This so that even in cases where the controlled person has not been informed of the essentials of the case against him or her or the evidence relied on by the Secretary of State."

Silber J ordered that the control order should continue in force.

The decision of the Court of Appeal

32. The Secretary of State appealed to the Court of Appeal against the decisions in relation to AF and AN. AE appealed against the decision in his case. These appeals were joined with a further appeal by the Secretary of State against a decision of Sullivan J in favour of a controlee known as AM [2008] EWCA Civ 1148; [2009] 2 WLR 423. In that case Sullivan J delivered a closed judgment only.

33. Sir Anthony Clarke MR and Waller LJ gave a single judgment. Sedley LJ dissented. The majority subjected the decision of this House in *MB* to a detailed and meticulous analysis. They summarised their conclusions in para 64 as follows:

"i) The question is whether the hearing under section 3(10) infringes the controlee's rights under article 6. In this context the question is whether, taken as a whole, the hearing is fundamentally unfair in the sense that there is significant injustice to the controlee or, put another way, that he is not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing is impaired. More broadly, the question is whether the effect of the process is that the controlee is exposed to significant injustice. In what follows 'fair' and 'unfair' are used in this sense.

ii) All proper steps should be made to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting.

iii) Where the full allegations and evidence are not provided for reasons of national security at the outset, the controlee must be provided with a special advocate or advocates. In such a case the following principles apply.

iv) There is no principle that a hearing will be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence. Alternatively, if there is, the irreducible minimum can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed.

v) Whether a hearing will be unfair depends upon all the circumstances, including for example the nature of the case, what steps have been taken to explain the detail of the allegations to the controlled person so that he can anticipate what the material in support might be, what steps have 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 is able to challenge it on behalf of the controlled person and what difference its disclosure would or might make.

vi) In considering whether open disclosure to the controlee would have made a difference to the answer to the question whether there are reasonable grounds for suspicion that the controlee is or has been involved in terrorist related activity, the court

must have fully in mind the problems for the controlee and the special advocates and take account of all the circumstances of the case, including the question what if any information was openly disclosed and how effective the special advocates were able to be. The correct approach to and the weight to be given to any particular factor will depend upon the particular circumstances.

vii) There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere."

34. There are two points I would make in respect of this summary. The first is that the majority concluded that there was no absolute requirement to disclose the gist or essence of the Secretary of State's case to the controlee. The second is that the summary shows a degree of overlap between the question of whether the procedure has been fair and the question of whether the outcome of the hearing has been fair. This is particularly apparent in paragraph vi) where the test of fairness depends upon whether the procedure adopted can have affected the result. The distinction between procedural fairness and procedure that produces a fair result is one to which I shall revert.

35. The majority endorsed the reasoning of Silber J in *AE* and dismissed AE's appeal. They held that Mitting J had misdirected himself in *AN* in concluding that there was an irreducible minimum of material that had to be disclosed to the controlee and remitted AN's case for further consideration, directing that this should await the present decision of this House. The majority reached a similar decision in relation to Stanley Burnton J's decision that there was no "makes no difference" principle and remitted AF's case for further consideration. It found no error in Sullivan J's closed judgment in *AM* and dismissed the Secretary of State's appeal in that case. I have based this summary on the open judgment delivered by the majority. A closed judgment was also delivered.

36. In his dissent Sedley LJ reached a contrary decision to that of the majority on the critical issue of whether it was fundamental to the fairness of the trial that the controlee should have the case against him disclosed to him and thereby given the opportunity to answer it. He held that this House had not, in fact, determined this in *MB*. His conclusions appear from the following passage of his judgment:

> "112. … The question for this court is whether, in a case such as *AF's*, where the judge took the view that he could be sure that the evidence, albeit wholly undisclosed, was unanswerable, the law regards the requirements of a fair hearing as satisfied. In my judgment, for reasons both principled and pragmatic, Stanley Burnton and Mitting JJ were right to hold that the law did not do so.
>
> 113. Far from being difficult, as Lord Brown tentatively suggested it was, it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know."

37. In a postscript to their judgment the majority explained why the court proposed to take the unusual step of giving permission to AE, AF and AN to appeal to this House. This was that the approach to be adopted to the use of closed material in section 3(10) hearings was a matter of general public importance and there was scope for argument as to whether the majority had correctly interpreted the views of the majority of the House in *MB*.

38. While, for reasons that will become apparent, this question has become of only academic interest, I would wish to record my opinion that the majority of the Court of Appeal, and Silber J, had correctly analysed the effect of the majority opinions in *MB*.

Submissions

39. Lengthy printed cases were submitted that indicated that there was to be a hard fought battle on the appeal to this House. The submissions made in the case on behalf of AF can be summarised as follows:

(i) Contrary to the decision of the Court of Appeal, the majority of the House decided in *MB* that article 6 of the Convention and the common law principle of fairness conferred on a controlee a core, irreducible entitlement to be told sufficient of the case against him to enable him to challenge that case unless, which was not the case so far as AF was concerned, the special advocates were able to defeat those allegations without such disclosure.

(ii) The House did not approve the "makes no difference" principle.

(iii) Alternatively, if the House held that there was no core, irreducible minimum that had to be disclosed, it should depart from that result and affirm the right of a controlee to know and respond to the case against him.

40. The joint case for AN and AE adopted the case for AF. It asserted that the common law right to a fair hearing, and the right to be aware of the case a person has to meet, was "a constitutional protection that is integral to the judicial function itself".

41. The case for the Secretary of State invited the House to depart from the approach of the majority in *MB* and to adopt instead the minority opinion of Lord Hoffmann. Alternatively it was submitted that the majority in *MB* had concluded correctly that article 6(1) did not guarantee a core, irreducible, minimum of disclosure. The relevant principle was whether, having regard to the proceedings as a whole, there had been significant injustice to the controlee or whether the controlee had been afforded "a substantial and sufficient measure of procedural justice". In answering that question it was permissible for the court to consider what difference further open disclosure would have made.

42. JUSTICE was granted permission to intervene and submitted a printed case that supported the appellants' cases. JUSTICE submitted

that there was a "solid bedrock of a core legal principle" that the substance of the case upon which a control order was based should be disclosed to the controlee.

43. A decision was taken that the appeal should be heard by a committee of nine members. Application was made, both by the Secretary of State and by the appellants, with particular support from their special advocates, that the House should give directions for the consideration of the closed judgments below, and possibly other closed material, in closed session. Directions were given that the question of whether to go into closed session would be taken after the parties had presented their cases in the open hearing.

44. On 19 February, a little over a week before the commencement of the appeal in the House, the Grand Chamber of the Strasbourg Court handed down its judgment in *A and others v United Kingdom* (Application No 3455/05). This addressed the extent to which the admission of closed material was compatible with the fair trial requirements of article 5(4). The Secretary of State recognised that the judgment cut the ground from under her feet in so far as she had hoped to persuade the House to adopt the approach of Lord Hoffmann in *MB*. An amended case was filed on her behalf. This contained a lengthy analysis of the decision in *A v United Kingdom*. It submitted that the decision was consistent with the decision of the majority of the House in *MB*, as correctly summarised by the Court of Appeal in the passage that I have set out above at paragraph 33. The Court of Appeal, applying the principles in that passage, had reached the appropriate conclusion in the case of each appellant.

45. The appellants also submitted amended cases that addressed the decision in *A v United Kingdom*. AF's amended case submitted that the Grand Chamber had made it clear that, regardless of the demands of national security, a person will not have a fair hearing for purposes of article 5(4) and article 6 unless they are told sufficient information about the case against them to enable them to give effective instructions to the special advocate who represents their interests. Accordingly, the decision of the majority of the Court of Appeal in relation to AF could not stand. The decision of Stanley Burnton J should be restored.

46. The amended case on behalf of AN and AE was to like effect. The Grand Chamber had established that a minimum requirement of procedural fairness was that a person had to be given the opportunity

effectively to challenge the allegations against him. Where there was a closed hearing the special advocate could not do this on behalf of his client in any useful way unless provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. Mitting J had held that AN could not meet a substantial part of the case against him and did not know the gist of significant grounds of suspicion raised against him. Silber J had wrongly proceeded on the basis that the special advocate procedure could compensate for an absence of any evidence or of a relevant particularised allegation having been provided to AE. The Grand Chamber's decision demonstrated that in neither case were the requirements of article 6 satisfied.

47. In the light of the decision in *A v United Kingdom* counsel for the appellants no longer submitted that it was necessary or desirable for the House to consider closed material, albeit that the special advocates sought, as they candidly admitted, to have their cake and eat it by inviting the House to consider the closed material if otherwise minded to reject their submissions. In these circumstances the House decided that it would not have a closed hearing or look at closed material.

A v United Kingdom

48. There were referred to the Grand Chamber 11 applications. The applicants had been detained pursuant to the provisions of the ATCSA. They complained of violation of a number of their Convention rights, including their right to liberty under article 5(1), relying upon the findings in their favour by this House. The United Kingdom was permitted by the Court to challenge those findings, but did so without success. The relevant complaints were those brought in relation to article 5(4). The Court summarised the respective cases of the parties as follows:

> "The applicants complained about the procedure before SIAC for appeals under section 25 of the 2001 Act (see paragraph 91 above) and in particular the lack of disclosure of material evidence except to special advocates with whom the detained person was not permitted to consult. In their submission, Article 5 § 4 imported the fair trial guarantees of Article 6 § 1 commensurate with the gravity of the issue at stake. While in certain circumstances it might be permissible for a court to

> sanction non-disclosure of relevant evidence to an individual on grounds of national security, it could never be permissible for a court assessing the lawfulness of detention to rely on such material where it bore decisively on the case the detained person had to meet and where it had not been disclosed, even in gist or summary form, sufficiently to enable the individual to know the case against him and to respond. In all the applicants' appeals, except that of the tenth applicant, SIAC relied on closed material and recognised that the applicants were thereby put at a disadvantage.
>
> On the applicants' second point, the Government submitted that there were valid public interest grounds for withholding the closed material. The right to disclosure of evidence, under Article 6 and also under Article 5 § 4, was not absolute. The Court's case-law from *Chahal* (cited above) onwards had indicated some support for a special advocate procedure in particularly sensitive fields. Moreover, in each applicant's case, the open material gave sufficient notice of the allegations against him to enable him to mount an effective defence."

49. In paragraph 4.54 of its Memorial to the Court the Government submitted that it would be highly desirable for the Grand Chamber to deal with the question of closed evidence in its proper place in the context of article 5(4), so that the law applicable in relation to the applicants should be properly and fully analysed by the Court. The Grand Chamber accepted that invitation.

50. The Government advanced in the Memorial a detailed defence of the use of closed material. At paragraph 4.77 it identified the critical issue in relation to this:

> "The Government submit that the result contended for by the applicants is wrong in principle. Their submission wrongly elevates the right of an individual to disclosure of relevant evidence under Article 5(4) (or Article 6) to an absolute right which necessarily overrides the rights of others, including the right to life under Article 2, and overrides the interests of the State in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services.

> Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including Article 5(4) (and Article 6), that the general interests of the community must be balanced against the rights of an individual (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, at para 69; *Soering v United Kingdom* (1989) 11 EHRR 439, at para 89)."

This is the critical issue that arises on the present appeals. For the reasons that follow I consider that the Grand Chamber has provided the definitive resolution of it.

51. The Court cited at length from the decision of this House in *MB* and also quoted the passage in the decision of the majority of the Court of Appeal in *AF* that I have set out at paragraph 33. The conclusions of the Grand Chamber appear in the following section of its unanimous judgment:

> "215. The Court recalls that although the judges sitting as SIAC were able to consider both the "open" and "closed" material, neither the applicants nor their legal advisers could see the closed material. Instead, the closed material was disclosed to one or more special advocates, appointed by the Solicitor General to act on behalf of each applicant. During the closed sessions before SIAC, the special advocate could make submissions on behalf of the applicant, both as regards procedural matters, such as the need for further disclosure, and as to the substance of the case. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC issued both an open and a closed judgment.
>
> 216. The Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants' detention the activities and aims of the al'Qaeda network had given rise to a 'public emergency threatening the life of the nation'. It must

therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5 § 4, a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information (see also, in this connection, *Fox, Campbell and Hartley*, cited above, (1990) 13 EHRR 157, para 39).

217. Balanced against these important public interests, however, was the applicants' right under Article 5 § 4 to procedural fairness. Although the Court has found that, with the exception of the second and fourth applicants, the applicants' detention did not fall within any of the categories listed in subparagraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a *sine qua non* (see paragraph 204 above). Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect (*Garcia Alva v Germany* (2001) 37 EHRR 335, para 39, and see also *Chahal* (1996) 23 EHRR 413, paras 130 - 131).

218. Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

219. The Court considers that SIAC, which was a fully independent court (see paragraph 91 above) and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this

connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. On the material before it, the Court has no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.

220. The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the

> procedural requirements of Article 5 § 4 would not be satisfied."

52. Mr Eadie QC for the Secretary of State sought valiantly and eloquently to persuade the Committee that this section of the Court's judgment was consistent with the House's decision in *MB*, as interpreted by the Court of Appeal in *AF*. He submitted that the principle to be derived from the judgment was that the controlee must have a reasonable opportunity to make an effective challenge of the case made against him. It was wrong, however, to treat the Court, in the latter part of paragraph 220 as laying down an inflexible principle that there can never be a fair trial if the basis of the Secretary of State's suspicion is to be found solely or to a decisive degree in the closed material. While in some cases this would be true, in others it would not. Each case would depend upon its particular facts.

53. Mr Eadie submitted that the Grand Chamber had not had placed before it a full picture of a section 3(10) hearing. It was not in a position to appreciate the extent to which the court could and did make allowances for the fact that the detainee was unaware of relevant material. Nor did it appreciate the extent to which the special advocate could and did compensate for that fact. The statement that the special advocate could not perform his function "in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" was simply wrong.

54. The committee had the benefit of submissions from the special advocates who had represented the appellants in the closed hearings. Their role was somewhat delicate as each had an obligation to represent to best effect the interests of his client and yet the response to this obligation had to be tempered by the duty to present fairly to the House the extent to which a special advocate could or could not compensate for the non-disclosure of closed material to the controlee. Mr Keith, whose submissions were adopted by the other special advocates, sought to meet this challenge by supporting the observations of Ouseley J in another control order case, *Secretary of State for the Home Department v Abu Rideh* [2008] EWHC 1993 (Admin). Of particular relevance are the following:

> "21…In my view, cross-examination by special advocates can usually deal with evidential reliability, possible

> alternative and innocent inferences, internal consistency or contradictions, the significance of pieces of evidence and the strength of the case overall. What they cannot do without instructions or evidence is to provide evidence or explanation which contradicts or explains the closed essential features of the case against him or offer alternative inferences which they are not aware of or lack any support for.
>
> 40…The real value lies in the potential for a controlled person to provide evidence which shows a different picture or an innocent interpretation or explanation which counters the basis for the adverse inferences and does so beyond that which the special advocates may suggest. This would either be because there would now be an evidential basis for those suggestions or because the special advocate may not be able to anticipate or put together what the controlled person's position is. He may also be able to provide the special advocate with information or statements to be deployed as the special advocate sees fit, which the court and SSHD may never know of."

55. Mr Keith's submissions emphasised the practical importance in the interests of fair process of disclosing to the controlee the essential features of the case against him and challenged Mr Eadie's submission that the Grand Chamber had not ruled that such disclosure was essential.

56. Lord Pannick QC for AF pointed out that the Grand Chamber had reached its decision without reference to the closed material. It was thus clear that the test of fair process did not depend upon the strength of the closed case against the controlee. He submitted that whether or not the controlee would be able to provide input that would make any difference to the result was not to the point. What was in issue was not the fairness of the result, but procedural fairness. Procedural fairness required that the controlee should be given sufficient information about the case against him to be able to give effective instructions to the special advocate should he have an answer to that case. The submissions of counsel for the other appellants were to like effect. Counsel for each appellant submitted that the disclosure required by the decision of the Grand Chamber had not been provided in the case of his client.

The effect of the Grand Chamber's decision

57. The requirements of a fair trial depend, to some extent, on what is at stake in the trial. The Grand Chamber was dealing with applicants complaining of detention contrary to article 5(1). The relevant standard of fairness required of their trials was that appropriate to article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that article 5(4) imported the same fair trial rights as article 6(1) in its criminal aspect – see paragraph 217. Mr Eadie submitted that a less stringent standard of fairness was applicable in respect of control orders, where the relevant proceedings were subject to article 6 in its civil aspect. As a general submission there may be some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg Court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial. Were this not the case, it is hard to see why the Grand Chamber quoted so extensively from control order cases. I turn to the effect of the Grand Chamber's decision.

58. Had there been any doubt as to the effect of the passage of the judgment of the Grand Chamber that I have set out in paragraph 51 above it would, as Lord Pannick pointed out, have been dispelled by the approach of the Grand Chamber to some of the individual applications. Thus in the case of the third applicant SIAC had, in reaching its conclusion that the applicant was a terrorist, relied only on closed material "which cannot in our judgment have an innocent explanation", but the Grand Chamber held that his hearing had been unfair for want of adequate disclosure. In the case of the fifth applicant SIAC had stated that they had "no doubt" that he had been engaged in certain terrorism-related activities but the Grand Chamber held that his hearing had been unfair because the case against him had largely been contained in the closed material and the open case was "insubstantial".

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

on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

Discussion

Procedural fairness and the fair result

60. Counsel for the appellants drew a distinction between a procedure that was fair and a procedure that was likely to produce the right outcome. This case, they submitted, was about the requirements of fair process, not about whether the outcomes of the individual cases were just. I do not believe that it is possible to draw a clear distinction between a fair procedure and a procedure that produces a fair result. The object of the procedure is to ensure, in so far as this is possible, that the outcome of the process is a result that accords with the law. Why then should disclosure to the controlee of the case against him be essential if, on the particular facts, this cannot affect the result?

61. One answer to this question is that one cannot be sure that disclosure will not affect the result. This was the reason advanced by Sedley LJ in the passage that I have cited from his judgment. Its classic exposition is this extract from the judgment of Megarry J in *John v Rees* [1970] Ch 345, at p 402:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against

them has been made without their being afforded any opportunity to influence the course of events."

62. I am not convinced that all of these observations are valid in the present context. What is in issue in control order cases is whether there are reasonable grounds for suspecting involvement on the part of the controlee in terrorism-related activity. This is a low threshold to cross and there are, so it seems to me, bound to be cases where the closed evidence is so cogent that the judge can rightly form the conclusion that there is no possibility that the controlee would be able, if this evidence were disclosed to him, to dispel the reasonable suspicion. Nothing in life is certain, but I believe that with the assistance of the dedicated special advocates that are available and the input of judges with the ability and experience of those who hear these cases, the approach approved by this House in *MB*, including the "makes no difference" principle, could have been applied without significant risk of producing unjust results.

63. There are, however, strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge. Next there is the point made by Megarry J in respect of the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result. The point goes further. Resentment will understandably be felt, not merely by the controlee but by his family and friends, if sanctions are imposed on him on grounds that lead to his being suspected of involvement in terrorism without any proper explanation of what those grounds are. Indeed, if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.

64. The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where

the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence. That is why the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals.

65. Before *A v United Kingdom,* Strasbourg had made it plain that the exigencies of national security could justify non-disclosure of relevant material to a party to legal proceedings, provided that counterbalancing procedures ensured that the party was accorded "a substantial measure of procedural justice" – *Chahal v United Kingdom* (1996) 23 EHRR 413, at para 131. Examples were cited by the Grand Chamber in *A v United Kingdom* at paras 205-208, covering the withholding of material evidence and the concealing of the identity of witnesses. The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.

66. In *A v United Kingdom* the Strasbourg court has nonetheless recognised that, where the interests of national security are concerned in the context of combating terrorism, it may be acceptable not to disclose the source of evidence that founds the grounds of suspecting that a person has been involved in terrorism-related activities. In the light of this it should occasion no surprise that no counsel suggested that the decision of this House in *R v Davis* [2008] UKHL 36; [2008] AC 1128 in relation to witness anonymity in criminal trials should be applied in the context of control order proceedings.

Can the PTA still be read down?

67. If the PTA is read down in the way determined by this House in *MB* the departure from the apparently absolute requirements of the

relevant statutory provisions will be more marked. It is perhaps open to question whether the House would have been prepared to read down the statute had this been anticipated. No party has suggested, however, that the reading down should be replaced with a declaration of incompatibility and I believe that there is good reason to let the reading down stand. Accordingly, I would propose this course.

68. The result will be that, in the section 3(10) hearing, the judge will have to consider not merely the allegations that have to be disclosed in order to place in the open sufficient to satisfy the requirements laid down by the Grand Chamber, but whether there is any other matter whose disclosure is essential to the fairness of the trial.

69. For the reasons that I have given I would allow the appeal in each case. In none has the disclosure required by the decision of the Grand Chamber been given. The appropriate course is to remit each case to the judge for further consideration in accordance with the decision of this House.

LORD HOFFMANN

My Lords,

70. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Phillips of Worth Matravers and I agree that the judgment of the European Court of Human Rights ("ECtHR) in *A v United Kingdom* (Application No 3455/05) requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit. It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to "take into account" decisions of the ECtHR. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when

it acceded to the Convention. I can see no advantage in your Lordships doing so.

71. The difference between the rule laid down by the ECtHR and what I had previously thought to be the law of England is that the Strasbourg court has imposed a rigid rule that the requirements of a fair hearing are *never* satisfied if the decision is "based solely or to a decisive degree" on closed material, whereas the view expressed by a majority of your Lordships' House in *Secretary of State for the Home Department v MB* [2008] AC 440 was that even in such a case, substantial justice might still be possible. As I understand the views expressed by judges of the Special Immigration Appeals Commission since *MB's* case, it is not unusual for the Commission to base its decision "to a decisive degree" on closed material and nevertheless to be satisfied, from the nature of that material, that the applicant has had a fair hearing.

72. The particular procedures which have to be followed to make a hearing fair cannot in my opinion be stated in rigid rules. Ordinarily it is true that fairness requires that an accused person should be informed of all the allegations against him and the material tendered to the tribunal in support. The purpose of the rule is not merely to improve the chances of the tribunal reaching the right decision (by giving the accused an opportunity to explain or contradict any such allegations or material) but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told. Seventeenth century lawyers were fond of quoting the example of *Genesis* 3.11, in which God, though omniscient, said to Adam "Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?". In such a case, however, there is no cost in compliance with the general rule. God suffered no disadvantage by revealing to Adam what he knew. The same is true in most cases in which there is a failure to disclose material. But when disclosure is contrary to the public interest, it is necessary to think more carefully and ask whether in all the circumstances it would really be unfair not to tell the applicant or accused. There may well be cases in which, from the point of view of reaching the right decision, it is clear to the Tribunal that it would be highly unlikely to make any difference. If that is the case, the procedure may be fair even though a subjective feeling of injustice is unavoidable.

73. It is true that a case which appears, on the basis of one side's evidence, to be incapable of rebuttal can sometimes be destroyed. The

remarks of Megarry J in *John v Rees* [1970] Ch 345, 402 about "unanswerable charges which, in the event, were completely answered" is often cited. Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted.

74. There are practical limits to the extent to which one can devise a procedure which carries no risk of a wrong decision. It is sometimes said that it is better for ten guilty men to be acquitted than for one innocent man to be convicted. Sometimes it is a hundred guilty men. The figures matter. A system of justice which allowed a thousand guilty men to go free for fear of convicting one innocent man might not adequately protect the public. Likewise, the fact in theory there is always some chance that the applicant might have been able to contradict closed evidence is not in my opinion a sufficient reason for saying, in effect, that control orders can never be made against dangerous people if the case against them is based "to a decisive degree" upon material which cannot in the public interest be disclosed. This, however, is what we are now obliged to declare to be the law.

LORD HOPE OF CRAIGHEAD

My Lords,

75. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I agree with it, and I gratefully accept his comprehensive explanation of the background to this case. For the reasons he gives I would allow the appeals and make the orders that he proposes. I wish to add only a few brief remarks of my own.

76. This case brings into sharp focus once again the acute tension that exists between the urgent need to protect the public from attack by terrorists and the fundamental rights of the individual. The country must be entitled to defend itself against those who would destroy its freedoms. The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle. But the court has another duty too. It is to protect

and safeguard the rights of the individual. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 the right that was in issue was the right to liberty. In this case it is a procedural requirement of the controlled person's right to a fair trial. This is a right that belongs to everyone, as the opening words of article 6(1) of the European Convention on Human Rights remind us – even those who are alleged to be the most capable of doing us harm by means of terrorism.

77. The tension is all the more acute in this case because the control order regime was introduced by the Prevention of Terrorism Act 2005 ("PTA 2005") in response to the judgment of this House that the preventive detention regime for aliens suspected of being involved in international terrorism was incompatible with their right to liberty under article 5(1) of the European Convention. Its aim is to protect the public from the risk of terrorist attacks by persons who for reasons of national security cannot, as the law stands at present, either be deported or prosecuted. No-one could reasonably object to this. But when account is taken of their nature, duration, effects and manner of implementation (see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 59), there is no doubt that control orders severely restrict the freedom of movement of those who are subjected to them. They are highly contentious, as Lord Brown of Eaton-under-Heywood observed in *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385, para 86. At one extreme they are not far short of house arrest, which plainly is a form of detention or imprisonment. But they can be designed in such a way that their cumulative effect does not deprive the controlled person of his right to liberty within the meaning of article 5(1): *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440, para 11, per Lord Bingham of Cornhill. Having found an alternative which avoids that objection, is the government's attempt to find a way of protecting the public which is not incompatible with Convention rights to be rendered ineffective because another obstacle derived from the Convention is put in its path?

78. At the heart of the problem is the use of special advocates where the Secretary of State wishes to rely in support of her case on closed material. In *Secretary of State for the Home Department v MB* [2008] AC 440, para 66, Baroness Hale of Richmond said that, with strenuous efforts from all, difficult and time consuming though it would be, it should usually be possible to accord the controlled person a substantial measure of procedural justice. Among the factors that would have a part to play in the assessment would be how effectively the special advocate had been able to challenge the material withheld on behalf of the controlled person and what difference its disclosure would have made.

Lord Brown said in para 92 that the question for the Administrative Court was whether it was possible to confirm the control orders consistently with there having been overall fairness in the appeal process. Lord Bingham too, in para 35, agreeing with Lord Woolf CJ in *R (Roberts) v Parole Board* [2005] 2 AC 738, para 83(vii), said that the task of the court in any given case was to decide, looking at the process as a whole, whether a procedure had been used which involved significant injustice to the controlled person.

79. It has to be said, in retrospect and with all the benefits that this brings, that this was an optimistic assessment. It assumed that the disadvantages that the use of closed material gives rise to could be overcome by looking at the proceedings in the round. As a way of testing whether a substantial measure of procedural justice has been achieved in situations where national security is at risk, this has its attractions. It suggests that no one factor need dominate all the others. It allows for the case where not even the gist can be disclosed to the controlled person by balancing the undoubted protections that are built into the procedure against the disadvantages that non-disclosure gives rise to. For its part the Grand Chamber in *A v United Kingdom*, (Application No 3455/05) (unreported) 19 February 2009, recognised that account can be taken of the fact that the judge who hears the application under section 3(10) of PTA 2005 is a fully independent judge who is best placed to ensure that no material is unnecessarily withheld, and that the special advocate can provide an important additional safeguard by questioning the Secretary of State's witnesses on the need for secrecy, by making submissions to the judge regarding the case for additional disclosure and by testing the evidence and presenting arguments on behalf of the controlled person during the closed hearings: paras 218, 219. It accepted too that the judge is in the best position to form a judgment about the extent to which the controlled person is disadvantaged by the lack of disclosure – or, to put it the other way, the proceedings over which he is presiding afford a sufficient measure of procedural protection.

80. The problem with that approach however has now been exposed by the Grand Chamber in *A v United Kingdom*. It took as its starting point the urgent need at the relevant time to protect the public from terrorist attack: para 216. It recognised that there is a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information. It accepted too that important protections are built into the procedure, and it made allowance for this factor. It acknowledged that the requirement of fairness under article 5(4) does not impose a uniform, unvarying

standard to be applied irrespective of the context, facts and circumstances: para 203. But in two vitally important sentences it made it clear that the procedural protections can never outweigh the controlled person's right to be provided with sufficient information about the allegations against him to give effective instructions to the special advocate.

81. In para 218 the Grand Chamber said that where full disclosure was not possible, article 5(4) required that the difficulties that this causes must be counterbalanced in such a way that the applicant still has the possibility effectively to challenge the allegations against him. In para 220 it said that, where the open material consisted purely of general assertions and the court's decision was based solely or to a decisive degree on closed material, the procedural requirements of article 5(4) would not be satisfied. The controlled person must be given sufficient information about the allegations against him to give effective instructions to the special advocate. This is the bottom line, or the core irreducible minimum as it was put in argument, that cannot be shifted.

82. In that case the judicial control that was in issue was by SIAC over the lawfulness of detention under section 23 of the Anti-terrorism, Crime and Security Act 2001. The Court was presented with a detailed and fully reasoned Memorial by the Government of the United Kingdom in which it was pointed out that the practical effect of the result contended for by the applicants was likely to be that a State might not be able to detain a terrorist suspect at all. Nevertheless it held that the impact of the deprivation of liberty on the applicants' fundamental rights was such as to import the same fair trial guarantees as article 6(1) in its criminal aspect: para 217. Mr Eadie QC for the Secretary of State very properly accepts that the effects of a control order on the controlled person are such that the same fair trial guarantees apply in his case too. He submits that account should be taken of the fact that they are less severe than those imposed by detention, but I do not think that there is room here for such a distinction. To adopt the language of the Strasbourg court in *Garcia Alva v Germany* (2001) 37 EHRR 335, para 39, the proceedings should in principle be conducted so as to meet to the largest extent possible the basic requirements of a fair trial. The difficulties that less than full disclosure gives rise to must be counterbalanced in such a way that the controlled person still has the possibility effectively to challenge the allegations against him. If that cannot be done, the judge must exercise the power that he is given by section 3(12) of PTA 2005 and quash the control order.

83. The approach which the Grand Chamber has adopted is not, as it seems to me, at all surprising. The principle that the accused has a right to know what is being alleged against him has a long pedigree. As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 155, a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him. The domestic and European authorities on which this proposition rests were referred to by Lord Bingham in *R (Roberts) v Parole Board* [2005] 2 AC 738, paras 16 and 17. In *Secretary of State for the Home Department v MB* [2008] AC 440, para 30 he drew attention to McLachlin CJ's observation for the Supreme Court of Canada in *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 SCR 350, para 53, that a person whose liberty is in jeopardy must know the case he has to meet and to *Hamdi v Rumsfeld* (2004) 542 US 507, 533 where it was declared by O'Connor J for the majority in the US Supreme Court that for more than a century it has been clear that parties whose rights are to be affected are entitled to be heard and that in order that they may enjoy that right they must first be notified.

84. I believe that a principled approach to the problem could not do other than the Grand Chamber has done in setting out the basic rule that must be applied. This makes it impossible to support the solution that commended itself to the majority in this House in *Secretary of State for the Home Department v MB* [2008] AC 440. I cannot agree with the way Sedley LJ read that case in his dissenting opinion in the Court of Appeal: *Secretary of State for the Home Department v AF* [2009] 2 WLR 423. In my opinion the majority in the Court of Appeal correctly understood the effect of the opinions of the majority in *MB*. But I think that there is much force in his protest that the answer to the question what difference disclosure might have made is that you can never know, and that for a judge to hold that a hearing in which the party affected has had no opportunity to answer is a fair hearing negates the judicial function which is crucial to the controlled order system: see paras 113, 115. The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

85. The principle is easy to state, but its application in practice is likely to be much more difficult. In *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin), Mitting J referred to the guidance that he found in the speeches in *Secretary of State for the Home Department v MB* [2008] AC 440. In para 9 he said:

> "The conclusion which I draw from the four speeches of the majority in *MB* is that unless, at a minimum, the special advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled except, perhaps, in those cases in which he has no conceivable answer to them. In practice, this means that he must be told their gist."

That analysis, which seeks to combine the approach of Lord Bingham with that of the other three who constituted the majority, must now be read subject to this crucial modification: there is no room for an exception where it is thought that the controlled person has no conceivable case to answer. The judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him. That is the core principle.

86. What will be needed in the application of this principle will, of course, vary from case to case. The judge is entitled to take the view that a person who really does have a case to answer will make every effort to provide his special advocate with the information he needs to make the challenge. He will also note that the Strasbourg court was careful not to insist on disclosure of the evidence. It is a sufficient statement of the allegations against him, not the underlying material or the sources from which it comes, that the controlled person is entitled to ask for. The judge will be in the best position to strike the balance between what is needed to achieve this and what can properly be kept closed.

87. That having been said, there are bound to be cases where, as Mitting J said in para 10 of his judgment in *AN*, the procedure will be rendered nugatory because the details cannot be separated out from the sources or because the judge is satisfied that more needs to be disclosed

than the Secretary of State is prepared to agree to. Lord Bingham used the phrase "effectively to challenge" in *Secretary of State for the Home Department v MB* [2008] AC 440, para 34. It was adopted by the Grand Chamber in *A v United Kingdom*, para 218. It sets a relatively high standard. It suggests that where detail matters, as it often will, detail must be met with detail. In *Secretary of State for the Home Department v AF* [2008] EWHC 453 (Admin), para 42, Stanley Burton J said that the allegations in the additional disclosure were insufficiently specific to enable AF to give specific instructions beyond a general denial. There may indeed be, as Mitting J suggested in para 10, a significant number of cases of that kind. If that be so, the fact must simply be faced that the system is unsustainable.

88. The House is in no position to say more, as it declined the Secretary of State's invitation to look at the closed material. I believe that it was right to do so. The judge at first instance must have access to it where it is said that disclosure of relevant material will be contrary to the public interest, and the Court of Appeal may perhaps need to too if this is necessary for the exercise of its jurisdiction under section 11(3) of PTA 2005. But the process should stop there. The function of the House, as the final court of appeal, is to give guidance on matters of principle. Its judgments must be open to all, not least to the controlled person. The giving of reasons in a closed judgment, which would be inevitable if it were to be based to any extent on closed material, is inimical to that requirement. It is hard to imagine any circumstances in which scrutiny of such material by the House, or by the Supreme Court when it comes into existence, would be necessary or appropriate.

LORD SCOTT OF FOSCOTE

My Lords,

89. I have had the great advantage of reading in draft the opinion on these appeals of my noble and learned friend Lord Phillips of Worth Matravers and agree that for the reasons he has given each of these appeals should be allowed. I am in general agreement also with the additional comments made by my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I want to add just a few words of my own on some of the constitutional implications that seem to me to emerge from these appeals.

90. The Prevention of Terrorism Act 2005 is expressed in its preamble to be

> "An Act to provide for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity …"

The "obligations" that may be imposed, spelled out in section 1(4), are, if all or many of them are imposed, highly onerous. They do not, or do not necessarily, amount to a deprivation of the liberty of the individual against whom they are made but undeniably are capable of constituting a serious impediment to the ability of that individual to enjoy many of the freedoms and pleasures of an ordinary life in this country.

91. As Lord Hope has observed (para 71 of his opinion) the government has a responsibility for the protection of the lives and well-being of those who live in this country and a duty to promote the enactment of such legislation as it considers necessary for that purpose. It is evident that the government regards the control order provisions contained in the 2005 Act as being necessary for that purpose. The duty of the courts, however, is rather different. It is not, directly at least, a duty to protect the lives of citizens. It is a duty to apply the law. Where the relevant law is, as here, statutory, the courts' duty is to construe the statute and faithfully to apply it so construed. In the process of construction the courts can and should take into account the purposes for which the statute was enacted and, by doing so, endeavour to reach a construction that promotes those purposes. The courts should also take into account treaty obligations by which the United Kingdom is bound under international law and assume, unless the language of the statute compels the contrary conclusion, that the legislature intended the statute to be consistent with those treaty obligations. All this is trite law but needs, I think, to be borne in mind when approaching the construction of the relevant provisions of the 2005 Act.

92. The 2005 Act was enacted in order to protect the citizens of this country from the risk of loss of life or physical injury caused by terrorist activities. But the Human Rights Act 1998 is also part of our law and that Act, too, must be construed and applied by the courts. The 1998 Act incorporated into our domestic law the rights, *inter alia*, set out in

Article 6 of the European Convention on Human Rights. It is worth repeating the first sentence of Article 6(1) :

> "In the determination of his civil rights and obligations …. everyone is entitled to a fair … hearing …"

It is not in dispute that the obligations imposed on each of the appellants by the control order made against him under the 2005 Act constitute civil obligations for the purposes of Article 6(1) and that unless the judicial proceedings conducted pursuant to section 3(10) of the 2005 Act (see paras 4 and 5 of Lord Phillips' opinion) afforded the appellant a "fair hearing" for Article 6(1) purposes, the appellant's Article 6 rights have been breached.

93. It is, of course, open to Parliament to enact legislation that is incompatible with one or more of the Convention rights. The ability to do so is inherent in the constitutional role of a sovereign Parliament. One of the issues which these appeals appeared to me, when I first read the papers, to raise was whether that was what Parliament, in enacting the 2005 Act, had done. In that case, regardless of the question whether the section 3(10) judicial proceedings had afforded the appellants a fair hearing, these appeals would have had to be dismissed on the simple ground that the making of the control orders had complied with the statutory conditions prescribed by the 2005 Act, that the procedures prescribed by the Act for the judicial proceedings had been followed and that that was enough to ensure the validity of the control orders.

94. However, in *Secretary of State for the Home Department v MB and AF* [2008] AC 440, a case which raised the same issues regarding control orders as are raised by these appeals, my noble and learned friend Baroness Hale of Richmond expressed the opinion at p 491, that – "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'." This addition to the statutory language by the reading-in of an express "fair trial" exception bars the withholding from an individual on whom a control order has been, or is proposed to be, imposed of any material on which reliance is placed by the Secretary of State as justifying the imposition of the control order. In effect, the statutory power to impose a control order on an individual cannot be exercised unless the Secretary of State is prepared to disclose to the individual the material proposed to be relied on in the requisite judicial proceedings.

95. My Lords, I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders. It seems to me very well arguable that the detail in which and the precision with which the statutory procedure for the judicial hearings is laid down in the 2005 Act makes it impermissible to argue that compliance with the express statutory requirements is not enough to ensure the validity of control orders and that, in addition, other requirements of a "fair hearing" for Article 6(1) purposes must also be met. This point, however, when put to Mr James Eadie QC, counsel for the Secretary of State, was received with no enthusiasm. The Secretary of State accepts, as I understand it, that unless the judicial procedure prescribed by the 2005 Act, with its involvement of special advocates, closed hearings and the like, results in a "fair hearing" for Article 6(1) purposes, the control orders in question cannot be held to have been validly made, or, as the case may be, validly confirmed. Without the reading-down of the statutory power to make these orders proposed by Baroness Hale in *MB and AF* that addition to the express statutory requirements could not, in my opinion, be accepted. Without that reading-down, the sovereignty of Parliament would, in my opinion, require the conclusion that where the express statutory requirements have been complied with the control orders would have been validly made, or confirmed, whether or not the judicial procedure involved a breach of the controlees' Article 6(1) Convention rights. But the Secretary of State has accepted that the relevant statutory provisions should be construed with the words proposed by my noble and learned friend read into paragraph 4(3)(d) of the Schedule and with the consequence that valid control orders can be made only where they are accompanied by judicial proceedings that constitute a fair hearing for Article 6(1) purposes. So be it.

96. It follows that the only issue on this appeal is the fair hearing issue. Does a judicial process the purpose of which is to impose, or to confirm the imposition of, onerous obligations on individuals on grounds and evidence of which they are not and cannot be informed constitute a fair hearing? The judgment of the Grand Chamber in *A v United Kingdom* has made clear that, for the purpose of Strasbourg jurisprudence and Article 6(1) of the Convention, it does not. I am in respectful agreement with the reasons given by the Grand Chamber for that conclusion but, in my opinion, and in agreement with the observations made by Sedley LJ in paragraphs 113 to 116 of his dissenting judgment in the Court of Appeal, the common law, without the aid of Strasbourg jurisprudence, would have led to the same conclusion. An essential requirement of a fair hearing is that a party

against whom relevant allegations are made is given the opportunity to rebut the allegations. That opportunity is absent if the party does not know what the allegations are. The degree of detail necessary to be given must, in my opinion, be sufficient to enable the opportunity to be a real one. The disclosure made to each of these appellants was insufficient to afford him a real opportunity for rebuttal. He did not, therefore, have a fair hearing for Article 6(1) purposes and these appeals must be allowed.

97. It does not follow from the result of these appeals that the executive cannot be given by Parliament power to impose control orders on individuals accompanied by judicial procedures that do not comply with Article 6(1), or with common law, fair hearing requirements. The result of these appeals does mean that the executive has not yet been given such powers by Parliament. If the words read by Baroness Hale into the 2005 Act statutory power enabling relevant material to be withheld from the individual on whom a control order is sought to be imposed "except where to do so would be incompatible with the right of the controlled person to a fair trial", a reading-in, as I have said, accepted by the Secretary of State, were to be expressly excluded by Parliament, the legislation would achieve what was, I assume, originally intended. The government would, of course, not propose such an express exclusion unless wholly satisfied that the discharge of its responsibility for the protection of the public from the risk of loss of life or limb from terrorist activity required such a thing. Parliament would not enact such an express exclusion unless so satisfied. Such an exclusion would leave the legislation potentially incompatible with the Convention and, unless the exclusion could be justified under Article 15 of the Convention, would leave this country in breach of its treaty obligations. But the courts would be bound, nonetheless, faithfully to apply the legislation. The underlying problem, as I see it, with the 2005 Act and the government's attitude to it, is that the government, having formed the view that the provisions of the Act were necessary for the safety of the public from terrorism and, accordingly, having promoted and obtained the enactment of the 2005 Act, has been unwilling publicly to accept that the implementation of these provisions may require the curtailment of fair hearing rights, and to face up to whatever may be the political consequences of that acceptance. The function of the courts is to apply the law. It is not the function of the courts to water down the concept and requirements of a fair trial so as to render Convention compatible legislation that may be incompatible. I am in no doubt that for the reasons given by Lord Phillips these appeals should be allowed.

LORD RODGER OF EARLSFERRY

My Lords,

98. I have had the advantage of considering the speech of my noble and learned friend, Lord Phillips of Worth Matravers, in draft. I agree with it and would accordingly allow the appeals. Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.

LORD WALKER OF GESTINGTHORPE

My Lords,

99. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Phillips of Worth Matravers. I am in full agreement with it, and for the reasons given by Lord Phillips I would allow these appeals and make the orders which he proposes.

BARONESS HALE OF RICHMOND

My Lords,

100. I agree that these appeals must be allowed, for the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers. I wish to add a few words of my own, out of courtesy to, and sympathy with, those judges who have had to grapple with my "enigmatic" opinion (and those of my colleagues) in *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] AC 440.

101. For what it is worth, which I agree is not much, my opinion now is that the views of Mitting J in *Secretary of State for the Home Department v AN* [2008] EWHC 372 (Admin) and Stanley Burnton J in *Secretary of State for the Home Department v* AF [2008] EWHC 453 (Admin) and [2008] EWHC 689 (Admin) come much closer to the opinions which I was expressing then than do the views of Silber J [2008] EWHC 132 (Admin) and [2008] EWHC 585 (Admin) and the Court of Appeal [2008] EWCA Civ 1148; [2009] 2 WLR 423. The ability to make an effective challenge to the case put against the controlled person is the key. However, I did not say so as clearly as, with hindsight, I should have done. And I was also far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure. There are reasons for this.

102. As to the first, it was not then clear precisely what test Strasbourg would employ in judging whether "any difficulties caused to the defence by a limitation on its rights [are] sufficiently counterbalanced by the procedures followed by the judicial authorities" (the principle which had clearly emerged from the Strasbourg jurisprudence up to that point). My noble and learned friends, Lord Hoffmann and Lord Bingham of Cornhill, took very different views on the point. Hence the main issue for us was whether the special advocate procedure would always be sufficient, or would rarely if ever be sufficient, or might be sufficient depending upon the nature of the case, how much had been disclosed and how effectively the special advocates had been able to challenge what was not disclosed. The majority took the view that it would not always be sufficient but might sometimes be so. Reading down the statute and rules so that the judges were no longer required to make the order, even though the Secretary of State was not willing to make sufficient disclosure to enable the controlled person to have a fair hearing, was the way to reconcile the competing interests. Despite considerable provocation to do so in the course of this hearing, the Secretary of State has not sought to persuade us to depart from that reading down. She has accepted that control orders cannot be confirmed by the court if the controlled person has not had a fair hearing. She and her counsel deserve full credit for taking that principled stance.

103. This is all the more creditable, given that Strasbourg has now, in *A and others v United Kingdom*, Application No 3455/05, Judgment, 19 February 2009, made it entirely clear what the test of a fair hearing is. The test is whether the controlled person has had the possibility effectively to challenge the allegations against him. For this he does not have to be told all the allegations and evidence against him, but he has to have sufficient information about those allegations to be able to give

effective instructions to his special advocate. This is the way in which Mitting J put the principle in para 9 of his open judgment in *AN* and he too deserves credit for his prescience.

104. Since then we have also had the benefit of very full submissions by the special advocates, explaining just what it is that they are and are not able to do in the course of a typical closed control order hearing. In particular, they have set out, probably for the first time in public, the principles which have been generally applied by the courts in relation to the disclosure of closed material. It is not for us, in these proceedings, to decide whether they are correct. For the time being, they represent the law. It is worth setting them out here:

> "(a) Issues of relevance and materiality are irrelevant. There is no balance to be struck between the harm to the public interest if disclosure were to be made and the harm to the interests of justice flowing from non-disclosure: the interests of justice play no part in disclosure decisions on the routine application of CPR Part 76.
>
> (b) The fact that closed material may contain documents that are exculpatory is not relevant in seeking to contend for disclosure to the controlled person.
>
> (c) Any disclosure is assumed to be not just to the controlled person, but to the world at large;
>
> (d) The test is met by mere contemplation by any party of the nature of the primary source of the information, rather than that person's actual identification of that source of information. Therefore disclosure of information is harmful where it may lead to a suspicion in the mind of the controlled person, or a hardening of an existing suspicion, even falling short of actual knowledge or information. Accordingly, for example, the fact the respondent may already suspect that his landline or principal mobile phone has been intercepted would not of itself justify disclosure of that fact.

(e) National security concerns advanced by the Security Service are within its particular expertise and accordingly very convincing material is required before such powerful considerations can be overcome."

105. The result, the special advocates tell us, is that the scope for contesting the Secretary of State's objections to disclosure is very limited and the vast majority of those objections are upheld. It appears that the objections are often in the nature of class claims, relating to the sort of information it is, rather than specific to the particular case. This makes them very different from the other cases mentioned in my opinion, relating to children and mental patients, where non-disclosure may be permissible. These days, a Mental Health Review Tribunal would be unlikely to uphold a non-disclosure claim on the general ground that disclosure would be damaging to the doctor patient relationship. They would want to know precisely what it was in this doctor's evidence that might cause serious harm to this patient or to some other person and to weigh that damage against the interests of fairness (see Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699(L16)), rule 14(2)). It will be an individualised balancing act carried out after discussion with the patient's own advocate and in the light of the opinions of the patient's own independent medical adviser.

106. Under the principles applied to control order cases, that balancing act is largely left to the Secretary of State. So there are bound to be many more cases than I anticipated where the judge is forced to conclude that there cannot be an effective challenge without further disclosure and the Secretary of State is left to decide whether she can agree to it. But the bottom line is that the control order cannot be upheld if the hearing cannot be fair. That seems to me to be an entirely proper and principled conclusion. If the Government adjudges that it is necessary to impose serious restrictions upon an individual's liberty without giving that individual a fair opportunity to challenge the reasons for doing so, as to which it is not for us to express a view, then the Government will have to consider whether or not to derogate from article 6 of the Convention. Until that time, judges will have to grapple with precisely how much disclosure is necessary to enable the controlled person to mount an effective challenge and the Secretary of State will have to grapple with whether to agree to it. The principles are clear, although by no means easy to apply in particular cases, and in common with my noble and learned friend Lord Brown of Eaton-under-Heywood, I hope that they will not have to trouble the appellate courts again.

LORD CARSWELL

My Lords,

107. When the majority of the Appellate Committee in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440, of whom I was one, expressed their conclusions they were of the view that there may be cases in which it is possible to accept that the person subject to a control order ("the controlee") has received a fair trial, even though the material adduced by the Secretary of State in support of the control order may have been based solely or to a decisive degree on closed material. They were of opinion that the fairness of the procedure would depend on all the facts and that in some cases of this nature the special advocate might be able to discern with sufficient clarity how to deal with the closed material without obtaining direct instructions from the controlee (see para 85 of my opinion in that appeal). This approach contained a degree of flexibility, which might be said to be in accord with the spirit of the common law.

108. The Grand Chamber in *A v United Kingdom* (Application No 3455/05, judgment 19 February 2009) has expressly opted for an absolute rule, especially in the last sentence of para 220 of the judgment of the Court:

> "Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied."

As your Lordships have pointed out, section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account. Whatever latitude this formulation may permit, the authority of a considered statement of the Grand Chamber is such that our courts have no option but to accept and apply it. Views may differ as to which approach is preferable, and not all may be persuaded that the Grand

Chamber's ruling is the preferable approach. But I am in agreement with your Lordships that we are obliged to accept and apply the Grand Chamber's principles in preference to those espoused by the majority in *MB*.

109. I therefore have to agree that the appeals should be allowed and each case remitted to the judge for further consideration.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

110. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Phillips of Worth Matravers. I gratefully take from it all the relevant facts, statutory materials, and arguments. I agree with it and add a short judgment of my own only because of my earlier close involvement in *Secretary of State for the Home Department v MB* [2008] AC 440 with the issues now arising.

111. The UK's Memorial of February 2008 in *A v United Kingdom* (Application No 3455/05), judgment 19 February 2009, expressly invited the Grand Chamber to deal with the whole question of closed evidence and special advocates in the context of today's terrorist threat. All that the three appellants seek in these appeals to the House is that the Secretary of State should now accept and apply the Strasbourg Court's judgment. True, *A* was directly concerned, not with control orders imposed under the Prevention of Terrorism Act 2005 but with the earlier regime of detention (at Belmarsh Prison) under the Anti-terrorism, Crime and Security Act 2001, and accordingly with article 5(4) of the Convention rather than, as here, article 6. True too, the ECtHR in *A*, holding that article 5(4) "must impose substantially the same fair trial guarantees as article 6(1) in its criminal aspect", took account of "the dramatic impact of the lengthy—and what appeared at that time to be indefinite—deprivation of liberty on the applicants' fundamental rights". Whilst, however, non-derogating control orders, such as those under challenge here, by definition involve no deprivation of liberty, they involve the severest possible restrictions on a number of important Convention rights (and, of course, on freedom of movement albeit the UK have not ratified Protocol 4 so as to confer that particular right); they too (albeit reviewable annually) may appear indefinite, and it

cannot sensibly be supposed that Strasbourg would take a different view about the application of the fair trial guarantees to them.

112. The essential similarities between the two regimes are altogether more striking than their differences. Both involve the making of orders on the basis only of reasonable suspicion of terrorist activity. And, of course, both involve identical schemes for the admission of closed material and the use of special advocates. That detention orders were appealable to SIAC, whereas control orders are subject to review by a single High Court judge, is an immaterial distinction.

113. There is, let me say at this point, all the difference in the world between both these regimes and the appeal jurisdiction exercised by SIAC under the SIAC Act 1997 such as was recently considered by the House in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 WLR 512. Those cases concerned the expulsion of undesirable aliens and the House roundly rejected the attack there on the use of closed material. As was pointed out, the process in those cases was beyond the reach of article 6 and in any event involved no case being made *against* the deportee but rather his case against the state to which it was proposed to deport him.

114. Your Lordships are therefore bound to apply *A* in the determination of these appeals. Section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account and *A* could hardly be more authoritative, contemporary or closer in point than it is. What then follows? Inexorably, as it seems to me, these appeals must be allowed and the Secretary of State be given now the option of disclosing further material as the price of maintaining the control orders, in their present or modified form. (Although by definition the courts have decided that any further disclosure in these cases would be contrary to the public interest, all agree that on their remission to the judges below, the Secretary of State would, in a final assessment of the public interest, have to balance that damage against the damage resulting from the control orders being discharged.)

115. The essence and effect of the Grand Chamber's decision in *A* can be comparatively shortly stated. It comes to this:

> (i) Although in the past—in cases like *Chahal v United Kingdom* (1996) 23 EHRR 413, *Tinnelly & Sons Ltd v United*

Kingdom (1998) 27 EHRR 249 and *Al-Nashif v Bulgaria* (2002) 36 EHRR 655—the Court has contemplated the use of special advocates as a means of counterbalancing procedural unfairness and thereby satisfying the requirements of articles 5(4) and 6, it has never previously actually decided the point—paras 209 and 211.

(ii) Special advocates can provide an important safeguard in ensuring that the fullest possible disclosure is made to the suspect as is consistent with the public interest (para 219). However, the special advocate cannot usefully perform his important role of "testing the evidence and putting arguments on behalf of the [suspect]" unless the suspect is "provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate" (para 220, second sentence).

(iii) "Where . . . the open material consist[s] purely of general assertions and [the judge's] decision [to confirm the control order is] based solely or to a decisive degree on closed material, the procedural requirements of [article 6 will] not be satisfied." (para 220, last sentence)

(iv) This is so despite the Court's express recognition (a) that there is "a strong public interest in obtaining information about al'Qaeda and its associates and in maintaining the secrecy of the sources of such information" (para 216) and (b) that no excessive or unjustified secrecy is employed; rather there are "compelling reasons for the lack of disclosure" (para 219).

116. In short, Strasbourg has decided that the suspect must *always* be told sufficient of the case against him to enable him to give "effective instructions" to the special advocate, notwithstanding that sometimes this will be impossible and national security will thereby be put at risk.

117. Was this what the majority of the Committee (Baroness Hale of Richmond, Lord Carswell and myself) held in *Secretary of State for the Home Department v MB* [2008] AC 440? I do not think so. Certainly we recognised that on occasion the special advocate procedure would fail to satisfy the requirements of article 6; but we contemplated that this would be so only in "a few cases" (Lady Hale, para 68), "wholly exceptional[ly]" (my opinion, para 90). More particularly, although I believe we felt the need to disclose to the suspect an irreducible minimum of allegation (to avoid an entirely Kafkaesque situation), we thought that in certain circumstances this might require very little information indeed, the position in AF's case itself (as to that, see para 42 of the opinion of Lord Bingham of Cornhill). Ouseley J, after all, had

expressly regarded the special advocate as providing AF with "a substantial and sufficient measure of procedural protection" and on this account we expressly contemplated that, although the case had to go back to the judge, he might well still conclude that overall the hearing had been fair and in compliance with article 6 (Lady Hale, para 76; Lord Carswell para 87; myself para 92).

118. In my opinion the majority of the Court of Appeal in the present case, in paragraph 64 of its judgment, correctly summarised the decision of the majority of the House in *MB* (save perhaps for the first sentence of para 64(iv) as to the irreducible minimum). Plainly, however, certain aspects of that decision can no longer stand in the face of *A*. In particular *A* is inconsistent with *MB* (as summarised by the Court of Appeal below) at para 64(iv)—that any requirement for an irreducible minimum "can, depending on the circumstances, be met by disclosure of as little information as was provided in *AF*, which is very little indeed"—and para 64(vii): "There are no rigid principles. What is fair is essentially a matter for the judge, with whose decision this court should very rarely interfere."

119. Plainly there now *is* a rigid principle. Strasbourg has chosen in para 220 of *A* to stipulate the need in all cases to disclose to the suspect enough about the allegations forming the sole or decisive grounds of suspicion against him to enable him to give effective instructions to the special advocate. In reaching this decision Strasbourg clearly rejected the argument set forth in the Government's Memorial, including, for example, that article 6 confers no "absolute right which necessarily overrides the rights of others, including the right to life under article 2, and overrides the interests of the state in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services. Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including . . . article 6, that the general interests of the community must be balanced against the rights of an individual (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69 [and] *Soering v United Kingdom* (1989) 11 EHRR 439, para 89)."

120. That said, however, Strasbourg's solution to the problem itself plainly represents something of a compromise and gives some weight at least to the demands of national security. Although the Court (at para 217) spoke of importing "substantially the same fair trial guarantees as article 6(1) in its criminal aspect" and (at para 220) used the language—taken from its earlier judgments (in cases such as *Lucà v Italy* (2001) 36 EHRR 807 and *Doorson v The Netherlands* (1996) 22 EHRR 330)

concerning criminal convictions—of decisions "based solely or to a decisive degree" on closed material, the result arrived at is very different from that reached in the strictly criminal context. In criminal cases, Strasbourg has held that a conviction should not be based solely or to a decisive extent on anonymous statements (a principle recently applied by the House in *R v Davis* [2008] AC 1128). If the defendant does not know who his accuser is, he is obviously at a disadvantage in challenging his credibility and reliability. This, however, is not the approach which *A* now dictates in a control order case. Plainly *A* does not require the disclosure of the witness's identity or even their evidence, whatever difficulties that may pose for the suspect. What is required is rather the substance of the essential allegation founding the Secretary of State's reasonable suspicion.

121. Sometimes, of course, it will be impossible to separate out allegations from evidence and, in turn, evidence from its sources (whether these be informants or techniques, neither of which can be disclosed). And in these cases national security may need to give way to the interests of a fair hearing. That is where the ECtHR has chosen to strike the balance between the competing interests. Some of your Lordships may consider that it could and should have been struck differently, perhaps as it was in *MB*. Plainly there is room for at least two views about this, as indeed the differing opinions expressed in *MB* and by the various first instance and Court of Appeal judges in the present cases amply demonstrate. But, as I suggested at the outset, the Grand Chamber has now pronounced its view and we must accept it. Judges exercising this jurisdiction in future will clearly have to follow *A*. Inevitably there will continue to be closed hearings and special advocates. Now, however, that the approach to all this has been declared as definitively as possible, I cannot think that it will ever again be necessary for the Court of Appeal, as opposed to the first instance judges, to consider closed material or hold closed hearings or itself deliver closed judgments. There is a right of appeal only in point of law. The judges who deal with control orders are highly experienced in this work. No one will be better placed than they are to decide what disclosure must be given to meet the requirements of article 6 as now determined by the Grand Chamber and described in para 220 of *A*.

122. This, however, is for the future. For now, the appeals must be allowed and the cases remitted for reconsideration.