



## **AF and others v Secretary of State for the Home Department: JUSTICE press briefing**

### **Who are the parties?**

AF, AE and AN are three men challenging the Home Secretary's decision to place them under control orders. JUSTICE was also granted leave to intervene in the case.

### **What are the issues in this case?**

This case is about whether the defendants in control order cases have an absolute right of disclosure to some of the secret evidence against them, or whether (as the government argues) it is possible for a person to have a fair trial even though they do not know any of the secret evidence against them.

The idea that it might be possible to have a fair trial even without knowing any of the evidence was left open by the House of Lords decision in *MB* in 2007. Subsequently, a number of High Court judges found it very difficult to apply but the possibility was upheld by the Court of Appeal in October 2008.

In February 2009, however, the European Court of Human Rights ruled in a series of cases concerning SIAC that there was an absolute right to disclosure of some of the secret evidence under article 5(4) of the European Convention on Human Rights (ECHR).

### **What is the outcome?**

The House of Lords has unanimously ruled that the Court of Appeal and its own previous judgment in 2007 in *MB* were wrong. Under article 6 ECHR (the right to a fair trial), defendants in control order cases now have an *absolute* right to disclosure of 'sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.

**Does this mean that defendants in control order cases get to see all of the secret evidence?**

No. In accordance with what the European Court of Human Rights said in February, the House of Lords has drawn a distinction between the *allegations* against a suspect and the *evidence* against a suspect.

Defendants have a right to know all the allegations against them but not necessarily the evidence supporting the allegation.

**Will this end the use of secret evidence, special advocates or control orders?**

No. As Lord Brown says in his judgment, 'inevitably there will continue to be closed hearings and special advocates' (para 121).

However, it is likely that the government will find it increasingly difficult to justify control orders as the courts will almost certainly require them to disclose a great deal more of the secret evidence than is currently the case.

**Will the government be forced to disclose sensitive information?**

No. The ruling only means that the judge can direct the government to disclose evidence. The government still has the choice whether to comply. If the government thinks that the evidence is too sensitive to disclose, it can decide to withdraw the control order instead.

**SELECTED QUOTES**

**LORD PHILLIPS**

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. (para 59)

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 (para 65).

### **LORD HOPE**

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 (para 78).

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 (para 79).

The principle is easy to state, but its application in practice is likely to be much more difficult (para 80).

There are bound to be cases where ... 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 .... There may indeed be ... a significant number of cases of that kind. If that be so, the fact must simply be faced that the [control order] system is unsustainable (para 82)

### **LORD HOFFMAN**

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 .... 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 (para 84).

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 (para 88).

### **LORD SCOTT**

The government has a responsibility for the protection of the lives and wellbeing of those who live in this country and a duty to promote the enactment of such legislation as it considers 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. (para 91)

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 (para 97).

### **BARONESS HALE**

[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. (para 106)